TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 533

UNITED STATES, PETITIONER,

vs.

STANLEY S. NEUSTADT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 17, 1960
CERTIORARI GRANTED DECEMBER 19, 1960

Supreme Court of the United States

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INDEX

[fol. 1] (File Endorsement Omitted)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 1719

STANLEY S. NEUSTADT,
ROSE-BARBARA Y. NEUSTADT, PLAINTIFFS

v.

THE UNITED STATES, DEFENDANTS

COMPLAINT—Filed June 17, 1958

Come now the plaintiffs, by their attorney, and for their complaint against the defendant respectfully aver:

1. The plaintiffs are citizens and residents of the State of Virginia.

2. This case arises under the Federal Tort Claims Act, as amended (28 U.S.C. § 1346(b) and 28 U.S.C. Chapter 171).

3. On or about April 9, 1957 the plaintiffs entered into a contract for the purchase of a house and lot from Colonel and Mrs. Elmer Almquist, located at 1408 Oakcrest Drive, Alexandria, Virginia. The contract provided that the sale was conditioned upon the plaintiffs' obtaining a loan secured by a mortgage on the property with a term of thirty years, in the amount of eighteen thousand eight hundred dollars ($18,800.00), which loan and mortgage was to be insured by the Federal Housing Administration pursuant to the provisions of Title II Section 203 of [fol. 2] the National Housing Act, as amended (12 U.S.C. § 1709) and to conform with all of the provisions of that Act and the regulations issued thereunder.

4. The contract also provided that the seller would deliver to the plaintiff, prior to the sale of the property, a written statement setting forth the amount of the appraised value of the property as determined by the Federal Housing Commissioner.

5. At the time the contract was entered into, plaintiffs were advised and understood that before the Federal Housing Administration would enter into a contract of insurance with respect to a mortgage on a particular single-family dwelling, an employee of the Administration would make a careful physical inspection of the premises for the purpose of appraising the property and fixing its fair market value. Plaintiffs were also advised and understood that in the event the said inspection revealed any structural deficiency, substantial defect or other condition that would materially affect the fair market value of the property, the useful life of the property, or the eligibility of the property as security for a loan to be insured by the Federal Housing Administration, the defect or condition would be noted upon the appraisal or underwriting report made by the inspector and, if the condition could be satisfactorily corrected, the agreement to insure the loan by the Federal Housing Administration would be conditioned upon the correction of the defect or condition.

6. Plaintiffs relied upon the provision of the contract of sale that a statement of the amount of the appraised value of the property would be furnished to them and upon the fact that any substantial deficiency or defect in the property would be disclosed as the result of the inspection and appraisal made by the defendant in that they were not obligated to purchase the property if any such deficiency or defect existed and remained uncorrected.

[fol. 3] 7. Some time prior to March 14, 1957, an inspection of the property was made by the Federal Housing Administration and an appraisal and underwriting report was made in consequence of which the property was found to be eligible for mortgage insurance. The property was appraised at $22,750, and the condition of the property was certified in said report to be good. No condition requiring the correction of any deficiency or other similar defect was imposed by the Federal Housing Administration upon its execution of a contract of insurance upon the loan and mortgage covering the property.

8. Plaintiffs thereupon purchased the said property on July 2, 1957 for the total price of $24,000.00 of which $18,800.00 was borrowed upon the security of a mortgage insured by the Federal Housing Administration. Plaintiffs took possession of the property on that date and have resided therein since July 10, 1957.

9. At the time of the inspection of the property by the Federal Housing Administration, there did, in fact, exist a substantial and serious structural defect which should have been apparent to any person reasonably familiar with the construction and appraisal of single-family dwellings and particularly to a person whose occupation involved the inspection and appraisal of houses of this general character. The defendant, through its representatives, conducted its inspection of the property in so negligent and careless a fashion as to fail to observe that the foundation of the building had failed some time in the past and that there was reason to believe that another such foundation failure might occur in the reasonably near future. An inspection conducted with ordinary care would have disclosed this condition and would have resulted in the refusal of the Federal Housing Administration to insure the mortgage.

[fol. 4] 10. As the result of the negligence of the defendant, the plaintiffs have been damaged in that the fair market value of the property on or about July 2, 1957 was not more than $13,000.00 and plaintiffs would not have been obligated to purchase and would not have purchased the property for $24,000 but for the carelessness and negligence of the defendant.

WHEREFORE, plaintiffs demand judgment against the defendant in the amount of $11,000.00 and for such other and further relief as to this Court may seem proper.

/s/ Lawrence J. Latto
LAWRENCE J. LATTO
928 South 26th Street
Arlington, Virginia
Attorney for plaintiffs

[fols. 5-19] • • • •

[fol. 20] (File Endorsement Omitted)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

(Title Omitted)

ANSWER—Filed Jan. 2, 1959

Now comes the United States by its attorney and answers the complaint herein as follows:

FIRST DEFENSE

The complaint herein fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Any damage sustained by the plaintiff herein as described in the complaint was caused in whole or in part, or was contributed to, by the negligence or fault or want of care of the plaintiff and not by any negligence or fault or want of care on the part of the defendant.

THIRD DEFENSE

The complaint herein seeks to impose liability on the United States in a cause of action to which the United States has not waived its sovereign immunity.

FOURTH DEFENSE

The acts complained of as being negligent were in fact the result of use of reasonable care on the part of agents and employees of the United States and were not negligent acts.

Defendant has no knowledge or information sufficient to form a belief as to the nature or extent of the plaintiff's damage, if any and therefore denies the allegation of damage in the complaint.

FIFTH DEFENSE

1. Admits paragraph one of the complaint.

2. Denies that statutes referred to in paragraph two give jurisdiction to this Court to grant relief in this cause.

[fol. 21] 3. Admits paragraph three of the complaint.

4. Admits paragraph four of the complaint.

5. Defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraph five, therefore, denies each and every allegation of paragraph five.

6. Defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraph six, therefore, denies each and every allegation of paragraph six.

7. Admits paragraph seven of the complaint.

8. Admits paragraph eight of the complaint.

9. Defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraph nine, therefore, denies each and every allegation of paragraph nine.

10. Denies paragraph ten of the complaint.

WHEREFORE, having fully answered, the defendant prays that the cause be dismissed with costs to the plaintiff.

/s/ Henry St. J. FitzGerald
HENRY ST. J. FITZGERALD
Assistant United States Attorney

CERTIFICATION OF SERVICE OMITTED IN PRINTING

[fols. 22-23] • • • •

[fol. 24] (File Endorsement Omitted)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

(Title Omitted)

MOTION OF THE UNITED STATES FOR LEAVE OF COURT TO AMEND ANSWER—Filed March 20, 1959

The United States of America, defendant herein, by its attorney, Henry St. J. FitzGerald, Jr., Assistant United States Attorney in and for the Eastern District of Virginia, moves the court for leave to amend its answer on file herein in the following particular:

Adding two defenses to the complaint herein in the language as follows:

SIXTH DEFENSE

The complaint herein seeks to impose liability on the United States in a cause of action to which the United States has not waived its sovereign immunity in that the acts or omissions alleged in the complaint are such as would fall within the exclusionary provisions of Section 2680, Title 28, United States Code, and particularly subsection (a) thereof.

SEVENTH DEFENSE

The complaint herein seeks to impose liability on the United States in a cause of action to which the United States has not waived its sovereign immunity in that the provisions of Section 2680, Title 28, United States Code, and particularly, the provisions of Subsection (h) thereof, exclude from the coverage of the Federal Tort Claims Act, any claim against the United States arising out of misrepresentation or deceit.

/s/ Henry St. J. FitzGerald
HENRY ST. J. FITZGERALD
Assistant United States Attorney

[fol. 25]

POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO AMEND ANSWER

For points and authorities in support of this motion the United States relies upon Rule 15 (a) of the Federal Rules of Civil Procedure.

/s/ Henry St. J. FitzGerald
HENRY ST. J. FITZGERALD
Assistant United States Attorney

[fol. 26] (File Endorsement Omitted)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

(Title Omitted)

ORDER GRANTING LEAVE TO AMEND—Filed March 26, 1959

This cause came on to be heard on the defendant's motion for leave to amend its answer on file herein, and it appearing that justice requires that such an order be given and the court being fully advised, it is hereby

ORDERED that the defendant's answer be and hereby is amended by adding the following two defenses as if they were included in the answer as filed:

SIXTH DEFENSE

The complaint herein seeks to impose liability on the United States in a cause of action to which the United States has not waived its sovereign immunity in that the acts or omissions alleged in the complaint are such as would fall within the exclusionary provisions of Section 2680, Title 28, United States Code, and particularly subsection (a) thereof.

SEVENTH DEFENSE

The complaint herein seeks to impose liability on the United States in a cause of action to which the United States has not waived its sovereign immunity in that the provisions of Section 2680, Title 28, United States Code, and particularly, the provisions of Subsection (h) thereof, exclude from the coverage of the Federal Tort Claims Act, any claim against the United States arising out of misrepresentation or deceit.

/s/ Albert V. Bryan
United States District Judge

Charleston, S. C.
March 26, 1959

Plaintiffs, by their counsel, consent to the entry of this order.

/s/ Lawrence J. Latto

[fo]s. 27-50]

[fol. 51] (File Endorsement Omitted)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
At Alexandria

Civil 1719

STANLEY S. NEUSTADT and
ROSE-BARBARA NEUSTADT

v.

UNITED STATES OF AMERICA

MEMORANDUM BY THE COURT—Filed Oct. 20, 1959

The plaintiff-purchasers qualified for, and were entitled to, "a written statement setting forth the amount of the appraised value of the property as determined by the Commissioner" of the Federal Housing Administration. This was a right conferred upon them not by their contract alone but also by section 226 of the National Housing Act. 12 USCA 1715q, as added August 2, 1954. This statutory provision was intended to give a purchaser the benefit of the Government's appraisal as a guage of the fairness of the price he is paying. See Senate Report and Conference Report on 1954 amendment, pp. 2726 and 2828, respectively, of 2 United States Code Congressional and Administrative News, 83d Congress, 2d. Ses. 1954. Of course the statute meant an appraisal made with ordinary care and diligence. A fair appraisal here certainly necessitated an inspection of the property. For negligence by the Commissioner in the performance of this duty the United States is liable to the purchasers.

Such an appraisal is not merely a representation—any more than the marking of a wreck or the absence of a navigational aid is a representation to a mariner of the [fol. 52] presence or non-existence of a peril. Cf. Indian Towing Co. v. U.S., 350 U.S. 61 (1955) and Somerset Seafood Co. v. U.S., 193 F.2d 631 (4 Cir. 1951). A careful inspection of the property was a positive act required of the Commissioner by section 226 as a direct and im-

mediate service to the plaintiff-purchasers. His responsibilities to them were those due by a professional appraiser privately employed by a vendee; the Government's liability is the tort liability of the privately employed appraiser for negligence. 28 USCA 2674. The Commissioner's carelessness cannot be classed as a misrepresentation merely because the result is embodied in a report. Hence, there is no escape for the United States through the Federal Tort Claims Act's exception of liability for misrepresentation. 28 USCA 2674, 2680(h).

Paradoxically, the liability of the Government for a tort of the kind here is underscored by the terms in which section 2680(a) of the Act excepts from its acceptance of responsibility any claim, such as the plaintiffs', arising from an omission of a Government employee while executing a statute. The exemption is accorded only so long as the employee was "exercising due care". The finding of negligence here thus proves both the suability and the liability of the Government.

The evidence clearly estabilshes that the plaintiffs in good faith relied upon the Commissioner's appraisal in consummating their contract of purchase. Rightfully they assumed that the Cominissioner's appraisal followed a diligent and painstaking examination of the property. That there were serious structural defects in the house has been preponderantly proved. The evidence likewise shows that reasonable care by a qualified appraiser [fol. 53] would have warned them of the defects. From the evidence the court fixes the fair market value of the property, as of the time of the settlement of the contract, at $16,000.00. As the plaintiffs paid $24,000.00 in the acquisition of the property, they have suffered as a direct result of the negligent appraisal a loss of $8,000.00.

No discussion is needed of the defense of contributory negligence. It was not stressed at the trial, and the structural weaknesses in the building were not readily visible to a vendee inexperienced in construction. Nor, obviously, is the Government's argument sound for exemption under the "discretionary function or duty" provision of section 2680(a), Federal Tort Claims Act. Again, the court deems it unnecessary to discuss the additional

ground of liability pleaded by the plaintiffs: that the Federal Housing Administration having customarily undertaken to advise purchasers upon the condition of properties appraised by the Commissioner, and having so assumed this responsibility, even though as a volunteer, the United States is liable for any negligence of the Administration in this practice.

Adopting this memorandum as a statement of its findings of fact and conclusions of law, the court will enter a judgment for the plaintiffs against the United States in the sum of $8,000.00, with such interest and costs as are allowed by statute. Plaintiffs' attorney will present an appropirate order within fifteen (15) days, first submitting it to opposing counsel for comment as to form.

/s/ Albert V. Bryan
United States District Judge

October 20th, 1959.

[fol. 54] • • • • •

[fol. 55] (File Endorsement Omitted)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
At Alexandria

Civil 1719

STANLEY S. NEUSTADT and
ROSE-BARBARA NEUSTADT

v.

UNITED STATES OF AMERICA

FINAL ORDER ON TRIAL AND JUDGMENT—Nov. 30, 1959

This action having come on for trial before the Court, without a jury, the Honorable Albert V. Bryan presiding on June 24 and 29, 1959, the parties having appeared by their respective counsel, and having proceeded with the introduction of evidence, and the Court having heard all of the evidence and the arguments of counsel;

And the Court having on October 20, 1959 filed its memorandum opinion, and the Court having adopted said memorandum as a statement of its Findings of Fact and Conclusions of Law and found that the plaintiffs are entitled to a judgment against the United States in the sum of $8,000.00, with such interest and costs as are allowed by statute;

And the plaintiffs having filed their bill of costs in the total amount of $28.00 and the Clerk of this Court having duly taxed and allowed the same, it is hereby

ORDERED, ADJUDGED and DECREED this 30th day of November, 1959, that Stanley S. Neustadt and Rose-Barbara Y. Neustadt do recover of and from the United States of America the sum of $8,028.00, with such interest thereon as is authorized by law.

/s/ Albert V. Bryan
United States District Judge

Alexandria, Virginia.
November 30, 1959.
Approved as to form:

/s/ Henry St. J. FitzGerald
United States Attorney

[fols. 56-61] * * * *

[fol. 1] (File Endorsement Omitted)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 1719

STANLEY S. NEUSTADT and
ROSE B. Y. NEUSTADT, PLAINTIFFS

vs.

THE UNITED STATES OF AMERICA

REPORTER'S TRANSCRIPT

Before
United States District Judge
Hon. Albert V. Bryan
June 24 and 29, 1959

APPEARANCES:

LAWRENCE J. LATTO, ESQ.,
For the plaintiffs.

HENRY ST. J. FITZGERALD, ESQ.,
Assistant United States Attorney,
For the United States of America.

[fols. 2-5] * * * *

* * * *

[fol. 6] STANLEY S. NEUSTADT

was called as a witness by counsel in his own behalf and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LATTO:

Q. Would you state your full name, please?
A. Stanley S. Neustadt.

Q. And where do you reside, Mr. Neustadt?
A. 1408 Oakcrest Drive, Alexandria, Virginia.
Q. What is your profession?
A. I am an attorney.

• • • •

Q. Mr. Neustadt, you are the owner of the premises at 1408 Oakcrest Drive in Alexandria?
A. That is right, I am.
[fol. 7] Q. When did the purchase of this house first come under your consideration?
A. It was during the middle part of March in 1947 that we first were aware that this house was for sale and considered purchasing it.
Q. And can you describe briefly the negotiations leading up to the making of an offer on your part and on the part of your wife for the purchase of this house?
A. Well, my wife and I had been trying to find a home to purchase for some time, and had left our names with several real estate agents, and on the 14th of March one of these agents, a Mrs. Rena Hubbard of Hubbard Realty Company called my wife to suggest that there was a house in the area in which we were interested and which was for sale, which my wife might be interested in. My wife accompanied Mrs. Hubbard to this house which was just a few streets from where we then lived in an apartment.
During the afternoon and immediately upon her return home, called me at the office, and told me about the house, and we arranged that that evening after I returned from work I would go to look at the house with Mrs. Hubbard, which I did.
At the time I went to see the house it was, as I say, in the evening, and we met the current owners, Colonel Ormquist, who at that time was the owner of the house, showed me through the house. I looked at all the bed-[fol. 8] rooms and the other rooms in the house, and looked cursorily at the basement. I couldn't see much about the outside of the house because, as I say, it was 8:30 or 9:00 o'clock in the evening, and I returned home and agreed with my wife's impression that this house seemed to meet all of our requirements.

We discussed the matter with Mrs. Hubbard. There was, of course, a question of the financial arrangements and although the price at which the house was offered was substantially in excess of what we had considered, we were able to afford, it was suggested to us that if we made a slightly lower offer and were able to get a 30-years mortgage insured by the F.H.A., that the down payment, both the down payment which we would have to make and the monthly payments under the mortgage or deed of trust would be within our means.

Q. Had you discussed the terms of financing with the then owners of the house at the time of your visit?

A. No, indeed. At no time did we ever discuss the financing terms with the owners. As a matter of fact, that evening was the only time I saw the Ormquists until we had an effective contract after the final arrangements for the purchase had been made. We saw them once again. But at that time everything was set except for the actual settlement.

As I say, we considered that evening the desirability of the house and our ability to purchase it, and I might point out that both—well, I at least had been raised in [fol. 9] an apartment and knew very little about homes. I considered the possibility of hiring someone to inspect the house in order to ascertain whether it was structurally and otherwise sound, but it was my understanding that one of the Virginia F.H.A. financing, such as we contemplated, was that the F.H.A. appraisal which was necessary, would disclose matters of the kind about which I had any concern at all, so that it would not be necessary for me to hire an expert.

Q. Had you—

A. Along this line.

Q. Had you been advised that an F.H.A. appraisal of the house had been made?

A. Yes, indeed. The reason that we even considered making an offer for the house in view of the price at which it was being offered was our understanding that an F.H.A. appraiser had been there quite recently and that the then owners of the house were, had started the process of acquiring the necessary F.H.A. preliminary steps

so that the house could be sold with an F.H.A.-insured mortgage.

Q. Did you then make an offer for the house?

A. The following day after my wife and I considered this further, since it was an important step to us, we did, through the Hubbards, make an offer for the house. Our offer was expressly conditioned upon the obtaining of the kind of financing to which I referred, namely, an F.H.A. [fol. 10] appraisal in the amount of our offer with the largest first trust which F.H.A. would permit under such an appraisal and consequently, the smallest down payment.

Q. Was the price which you offered at this time the price which you ultimately paid for the house?

A. No, indeed. The price we offered at that time was $24,500, and the reason that we—well, I might say that our offer was accepted within a very short time, within just a few days. The Ormquists accepted our offer and the only thing that remained at that time was for the F.H.A. appraisal to be finished so that we'd know whether the conditions of the contract were fulfilled. It turned out that they were not because the F.H.A. appraisal which should have been $24,500 for the terms of our condition to become effective was not $24,500 but rather $22,750. With this appraisal the financing which we contemplated was impossible. So that at that point we stood about where we were when we started. It was agreed by everybody that no contract existed.

• • • •

[fol. 11] THE COURT: Let it be admitted.

(The Clerk so marked the document as Plaintiffs' Exhibit No. 1.)

BY MR. LATTO:

Q. Following the receipt of the information of the F.H.A. appraisal would not permit the purchase of the house under the terms of the financing provided in this contract, did you have further negotiations with the Ormquists, either directly or through the brokers?

A. Yes, we did. The F.H.A. appraisal which had now been made known resulted in a certain maximum first

trust which they would insure on the basis of—we now knew what the largest first trust we could acquire would be—on this basis, and with knowledge of our cash position we decided to make another lower offer for the home since we were not in a position to make any greater down payment than we had originally decided upon.

Q. Let me ask you this first. Did the fact that the F.H.A. appraisal was less than you had anticipated give you any concern?

A. It gave me very grave concern. It, as I indicated, we were novices in this area, and before we decided to make a second offer for the home, it occurred to me that the difference between the price which we had originally offered and which we thought the F.H.A. would appraise the house at and the amount which the F.H.A. finally appraised the house at may have been due to the exist- [fol. 12] ence of some flaw in the house which was deemed to reduce its value to that extent because we were concerned lest we would buy a house with some flaw which needed immediate or even ultimate repair. I established to my satisfaction that the lower appraisal did not in fact and could not in fact represent the difference in an appraisal, could not represent the existence of such a defect.

Q. Just how did you establish this to your satisfaction?

A. Well, the first thing I did was call the agents and ask them. However, in addition to that I called the vice president of one of the vice presidents of the bank where I maintained an account which has a large real estate department, and ask him point-blank whether the lower appraisal might reflect such a thing. And I also called one of the larger mortgage companies in Washington and asked the same question. In all instances I was assured that the practice of the F.H.A. in the event a defect in the house was—

• • • •

THE WITNESS: I was assured that if there were a defect it would not—defect, some substantial structural— [fol. 13] or other defect in the house it would not be reflected in a lower appraisal but rather a condition on the F.H.A.'s commitment to insure that the appraisal

would reflect the value of the house in sound condition and that if it were not sound, the commitment to insure would be conditioned on correction of the defect. The appraisal would not be affected by this. Once my wife and I became convinced of this; with the knowledge we then had, and we asked specifically, I might add, whether there was such a condition in this case and was informed it was not—once we were convinced that the appraisal did not indicate any unsoundness in the home, we did, as I say, make another offer at a lower total price.

BY MR. LATTO:

Q. Was that offer accepted?

A. This offer was not accepted. This offer was rejected, I understand, by the Ormquists.

Q. Well, let's see if we can speed this up.

Did you ultimately make an offer which was accepted?

A. After that offer was rejected, we made still a third offer which was accepted.

• • • •

[fol. 14] • • • •

• • • •

[fol. 15] BY MR. LATTO:

Q. Did you take possession of the house in accordance with the contract just admitted in evidence?

A. We did.

Q. About what time was that?

A. Well, we settled on July 2nd, 1957, but we didn't actually move our family into the house until the 10th of July of the same year.

• • • •

[fol. 16] Q. What was the general condition of the house at about the time you took title or moved into it, so far as the need for decorating, so on, general appearance as it appeared to you?

A. Well, on the 2nd of July after we took title, later in the day, my wife and I had the keys and we went over to look at the house expressly in order to see whether possibly any redecoration was necessary and we inspected

the house quite carefully, and we found absolutely nothing which would indicate the necessity for any redecoration at all. The walls, the interior walls of the house had all been relatively recently painted. We'd been told that they had been painted just before we first saw the house in March. House was immaculately clean and the walls and the ceilings, as I say, looked fine to us.

I did notice on that day for the first time a crack on the inside wall of the basement on the east side of the house, but it was a crack which had been filled in or pointed up, and as I say, the house seemed to be in very nice condition.

Between the 2nd of July and the 10th when we actually [fol. 17] moved in I took over some of our more fragile belongings which we didn't want the movers to take over and stored them in the what we call the sun parlor. It's an enclosed porch just off the living room, and when I stored these things in the sun parlor I noticed that the floor of the sun parlor sloped toward the front of the house a little bit, but other than these things that I have mentioned we did not notice anything untoward about the house. Until we moved in on the 10th with all of our belongings.

Q. How soon after you moved in on the 10th did you begin having problems with the house?

A. We, we remember very vividly the second night that we were there, which I think would be the evening of the 11th of July. A crack appeared in the plaster over the door which connects the living room with this sun parlor that I referred to. It was fairly deep crack which extended from the ceiling to the top of this door which I mentioned. Wtihin a day or two thereafter another crack opened on the opposite wall of the living room near the back of the house, which during the course of a day or two spread from the ceiling to the floor of the living room and not in a straight line. It would have been kind of a jagged line. My wife and I were upset about these cracks, but our initial thought was that they may have resulted from improper patching of the plaster when the house had last been redecorated. These cracks got wider [fol. 18] within the succeeding few days and at one point some of the plaster dropped to the floor from the crack

on the wall of the living room, and we starting getting cracks in the ceiling. And my wife became very concerned lest our children who are very young might be hit by some of this plaster, so we proceeded to try to see what we could do about fixing it.

Q. Did you call someone about making repairs to the plaster?

A. That is exactly what we did. We got the name of a plastering contractor and asked him to come look at the problem we had and took him a little while before he showed up, and in the meantime we contacted a second plastering contractor and then the first one showed up and he examined these cracks and he said to us that he would not undertake to repair them without some assurance from an architect or a builder that they would not immediately reopen because in his judgment they were certainly not due to any improper patching of the plaster. They were due to some basic defect in the house and that it would be a complete waste of time and money to try to just, to go ahead and try to patch the plaster without finding the basic cause of the cracks.

When the second plasterer showed up he gave us essentially the same information. So we started to try to find out what could be done. While all this was going on every day a new crack in the plaster appeared, and [fol. 19] finally we noticed that the basement walls, the inside which are cinder block which had been painted with a yellowish or tannish coat of Sta-Dri paint had also cracked fairly severely, and we became very worried about this. And the first person we contacted was the builder of the home of one of our neighbors.

She happened to know this gentleman and suggested that we should call him, which I did. He came out and looked at the house and he told us that there was something very basically wrong with the house. He wasn't completely certain what it was, but his advice to us was to fix the house up so it looked half-way decent and sell it immediately.

Of course, this was advice which we could hardly follow. We—sounded fraudulent in the first place, and second place, we had just moved into the house and we wanted

to live there if we could, and seemed like a snap judgment on his part, so I consulted another builder, who looked at the house more carefully and informed us that in his judgment the problem might result either from the roots of a large oak tree which stands in front of our house, or he thought more probably from some condition which had to do with the water content under our, and around the house. However, he wasn't in a position to really make a careful analysis of the problem and advise us on it, but he did feel that it was serious enough for us to exert every effort, whatever necessary expense.

Q. Did you consult at any time or about this time with [fol. 20] officials of the Federal Housing Administration?

A. Immediately thereafter I called the mortgage broker which at that time held our mortgage or our trust, and he suggested that I contact a Mr. Elliott at the F.H.A. who at that time I believe was the chief underwriter in the Washington Office of the F.H.A.

I called Mr. Elliott, explained what had occurred, and the advice that I had received, and he assured me that he would send out to our house an F.H.A. inspector who would look the place over and see what, if anything, needed to be done or could be done.

A few days later an inspector from the F.H.A. did come out to look at the house. His name was Harrison Jacobs. Mr. Elliott had assured me that Mr. Jacobs was the best inspector the F.H.A. had in this area, and by the time Mr. Jacobs arrived, I might add, there wasn't a room or a ceiling in the house that didn't have substantial cracks in the plaster. The basement walls all had cracks in the ciner block. The condition of the house had deteriorated to a frightening extent.

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[fols. 21-23] * * * *

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[fol. 24] Q. Bring you back now to the first visit by Mr. Jacobs. About how long did he spend at this time?

A. Well, my recollection isn't precise on this, but I am sure he was at the house for at least an hour, and possibly somewhat longer.

He inspected the house, it seemed to me, very carefully, measured it, how much the front wall and the basement had been pushed in, examined the floor of the basement very carefully and indeed the remainder of the house, all of the plaster cracks.

Q. Did he give you any advice at this point?

A. Yes, he did. He told me that it was obvious that a serious blunder had been made, * * *

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[fol. 25] Q. And were subsequent visits to your house by officials or employees of the F.H.A.?

A. Yes, there were. After I had written the letter, Mr. Jacobs returned on one occasion with a Mr. Simpson who I was told was the F.H.A.'s chief architect, and Mr. Henjun, who was not connected with the F.H.A. but who was the original builder of the home.

We had found out that the home was built in 1941 and that Mr. Henjun was the builder.

On this occasion the three gentlemen dug down on the outside of the house. Well, they didn't do it. They had a laborer that did it, dug down by the oak tree to ascertain whether it might be the roots of the tree and which were causing the trouble, and they decided that it was not. They also had a small hole broken through the concrete in the basement floor and examined the nature of the soil underneath the basement floor, and as a result of this visit which lasted well in excess of an hour also, they prepared a report which was later shown to me about what they thought the cause of the trouble was and how it might be possible, be remedied.

[fol. 26] Q. Did you receive a copy of that report?

A. Yes, I did.

* * * *

Q. Yes, do you want to say something else?

[fol. 27] A. Yes, I would like to add, I think I got the chronological—a little bit wrong—nothing that I have said so far is inaccurate, but between the time that Mr. Jacobs first came to the house and the time that Mr. Simpson and Mr. Henjun came with Mr. Jacobs, I believe that between that time there was a conference at my home between Mr. Jacobs, Mr. Elliott and Mr. Elliott's assistant,

a Mr. Slate. They all came out to my house at that time. Mr. Elliott and Mr. Slate saw the house for the first time. Mr. Slate, I recall, took some pictures, the various cracks in the basement?

Q. Was that during the day or during the evening?

A. This was during the day. I came home from the office again and during the course of this discussion it was again stated to me that a serious mistake had been made, that these gentlemen wished to do whatever they could to help me in my trouble. It never was made at all clear to me what they could do but it was subsequent to this time that they persuaded Mr. Henjun to come out and look at the house.

Q. Let me ask you this. You testified earlier that you were aware of the fact that if a house had a substantial defect, it would probably be revealed by the inspection made by the F.H.A., didn't you raise this question with Mr. Jacobs or Mr. Elliott or Mr. Slate or any of the other officials that you spoke with?

A. I am quite sure that I mentioned the fact that this [fol. 28] must have been the kind of thing that should have been ascertained at the inspection, and none of them ever suggested that I was wrong about this. Quite the contrary. They led me to believe that in fact a failure to discover this was the mistake or the blunder which they were talking about.

I might point out that among the first things that Mr. Jacobs noticed about the house when he saw the basement were these I-beams which I have referred to which are shown in Exhibits 9 and 10, which he informed me were obviously constructed after the house was originally constructed. They were not part of the original structure of the house, in other words. He also pointed out to me that the cracks which had opened along the front wall of the inside of the front wall of the basement had previously been pointed up. Something that was obvious to me after he showed me, but which I had never noticed before.

Q. Let me just establish this for the record. Those I-beams that you have mentioned, were they put in by you?

A. They were not put in by me. They were there.

Q. Did you have any pointing up on cracks filled in prior to the time these visits—

A. I absolutely had nothing done to the house of this kind in any way.

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[fol. 29] CROSS-EXAMINATION

BY MR. FITZGERALD:

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[fol. 30] Q. And these photographs which are in evidence show the condition of the house today, does it not?

A. That's right. These were taken last, last Sunday, I think.

Q. Can you point out anything in these photographs which was present in this condition on or before June the 2nd of 1957?

A. Of my own knowledge that they were present?

Q. Yes.

A. No, indeed.

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Q. Uh-huh. Now when you went to the house, when was the first time you saw that house?

A. First time I saw it, March 14, 1957.

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[fol. 31] A. After the 14th of March the only time I was inside the house before the 2nd of July was on about the 15th of June after the contract had been gone into effect.

• • •

Q. Were the grounds well gardened, appropriately planted?

A. I don't quite know what you mean by that.

Q. Were they landscaped? Did they have appropriate planning on the grounds?

A. We didn't think they were appropriate. They were landscaped. The house was completely covered with ivy, almost completely.

[fol. 32] Q. It was almost completely covered with ivy?

A. That's right.

Q. Where was the ivy not covering the house?

A. Well, there was, it was no ivy obviously—well, not obviously, but right over the front door. I think there was no ivy on the side of the sun parlor, and there may not have been ivy, I am quite certain there was not above the sun parlor on the east wall of the house, but except for that most of the house was covered with ivy.

Q. And in March of 1957 or the spring, several months of the spring of 1957, most of the areas where are covered by these photographs would have been covered, is that not correct?

A. Except for the areas I have just mentioned.

Q. I see, and you have since removed all that ivy?

A. A large part of it.

Q. I see.

A. It had to be removed so that we could point up the cracks.

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[fol. 33] Q. Tell me the names of all the friends you took to the house.

A. I took Mr. Latto to the house. I took Stanley Segal to the house. • • •

• • • •

Q. And did you have any conversation about the house with Mr. Segal?

A. Yes, I did.

Q. What was that?

A. We both, Mr. Segal went with me, I'm quite sure, on the day which we took title and we both commented upon high cleanly condition the house was in. He and I both noted pointed-up crack on the east wall of the basement and the crack over the front door between the front door and the window which is above it on the front wall of the house. I said to him and I assumed that this was in early settlement which had been remedied. That was the extent of the conversation.

Q. And was there any dampness or water in the basement?

A. No, none whatsoever.

Q. And did you talk with Colonel Ormquist about the [fol. 34] condition of the basement?

A. I remember asking him whether the basement got damp or whether it leaked, and he told me no. And I

could see that the basement was painted with Sta-Dri and he told me that he would leave partially filled can of Sta-Dri with the house when he left?

Q. Did he say that he had done any work on the house in connection with what we have just talked about, the basement?

A. I have the impression that he painted the basement with Sta-Dri, but if he told me that, that is all he told me about whether he did any work on the house himself.

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[fol. 35] • • • •

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[fol. 36] BERNARD F. LOCRAFT

was called as a witness by counsel on behalf of the plaintiffs and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LATTO:

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Q. And what is your profession?

A. I am a civil engineer.

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[fol. 37] • • • •

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[fol. 38] Q. Were you retained by Mr. Neustadt sometime in August, 1957, to advise him as to how he might meet the problems he's just finished describing?

[fol. 39] A. Why I was—I never knew Mr. Neustadt before, but he did retain me at that time.

Q. And did you personally make an examination of the house?

A. I personally visited the house on August 19, 1957, and examined it very carefully.

Q. Did you examine it at any other time?

A. I went to the house on several subsequent occasions during the course of my advice to Mr. Neustadt.

Q. Can you describe to the Court, give us a general description of the condition of the house as you found it on those days?

A. I found the house at 1408 Oakcrest Drive to be a two-story and basement, brick and cinder block, single-family home. I noticed the yard had several large trees in it, particularly near the front of the house. The house is located on the southerly side of Oakcrest Drive, several blocks east of the Fairlington subdivision. The yard around the house was relatively at and level at the house, but the terrain to the south and west of the house drained towards Mr. Neustadt's home without provision being made at the building to drain the water away from the walls of the house. I examined the exterior of the home and on the north or front of the house I noticed a vertical crack over the front door running up to about the second [fol. 40] floor level, and then easterly to the northeast corner of the building. At the, about the first floor level of the house I noticed a horizontal crack running towards the west corner of the house, northwest corner of the house. This crack was such that the basement wall had been pushed into the basement about an inch. That crack had been pointed up at some time. Previously.

On the east side of the house is a one-story sun parlor or sun porch. That sun parlor had a vertical crack at its junction with the main house, running from the ground up to the roof. On the south or rear of the house was a vertical crack over the head of the east window and also a horizontal crack near the kitchen door. On the west side of the house there was a horizontal crack about one-quarter of an inch wide at the first floor line, just about ground level, at the southwest corner.

Q. Let me interrupt you one moment. There has been some testimony about ivy which had covered a good part of the front wall of this house, the north wall. Had that ivy been removed or was it still present at the time of your examination?

A. Most of the walls of the house were covered with ivy, but these cracks were perfectly obvious to me.

Q. Were there any indications in any of these cracks that you have just referred to of having been previously pointed up?

[fol. 41] A. Yes, the crack in the front wall which was near the ground level where the basement wall had been pushed in about an inch had been pointed prior to my visit.

In the basement of the house I observed that the basement walls were 12 inches thick, of cinder block and that there were a number of cracks in those basement walls.

In the east wall there was a diagonal crack which had been pointed up. I could see that that crack had been about an inch and a half wide and on occasion of my visit the crack had again opened about an additional three-eights of an inch. It was a fine crack in the south wall over the laundry tub. There was a horizontal and vertical and diagonal crack in the west wall of the house in the basement. That crack ran from the floor to the ceiling before it stopped. And the north wall or front wall of the house there was a crack three-eigths of an inch wide about four feet three inches above the floor running the full width of the north wall. The basement floor of the cellar was badly cracked and out of level.

I observed two steel I-beam posts or columns placed near the north wall under the floor beams.

Q. Were you able to tell whether those columns were part of the original construction of the house or they had been added at a subsequent time?

A. From my knowledge of the situation I would say [fol. 42] they had been added after the building had been built. When, I don't know, but they were an afterthought. I then went up on the first floor and in the kitchen. There were cracks over the kitchen door and between the door from the kitchen to the dining room; in the dining room the crack showed over the door to the back into the kitchen, and also at the arch doorway going into the entrance hall.

There were also cracks in the ceiling, the dining room. In the entrance hall there were fine cracks over the arched doorway, both back into the dining room and leading over to the living room. The crack at the living room was clean and fresh. In the living room there were cracks over the arched doorway back into the entrance hall.

There was a crack over the doorway leading into the sun parlor. That crack was a wide crack with plaster

fallen from it. It was clean and fresh. I observed that the floor of the living room had a decided slope towards the north or front of the house and that the wood flooring of the living room had pulled away from the north wall about three-eights of an inch.

Q. I am not sure I follow that.

A. The flooring at the front of the house had been, was separated from the north wall by about three-eighths of an inch.

Q. You mean just a gap between the floor and the wall?

[fol. 43] Yes.

Q. I see.

A. I went into the sun parlor and observed the floor of the sun parlor sloping. The doors to the closets in that particular section of the house didn't close, didn't stay closed.

I went up on the second floor and observed cracks going up the stairway. I observed while no tile was broken in the bath, I observed that there were cracks over the head of the door to the hallway, and the northwest bedroom there was a fresh crack across the ceiling, running clear across the room. The floor was sloping towards the north of the house, towards the front. In the northeast bedroom there was a similar situation obtained. And the doors to the closets upstairs did not stay closed, either.

Q. Now did you attempt to devise a plan by which the condition you have just described could be remedied?

A. I investigated the records of the Building Department here in Alexandria to see if anything had been noted during the course of construction, and other than the normal remarks I learned nothing particular from that inspection.

Q. Did you make any investigation of soil near the house or under it?

A. I had one of my men drill an auger hole through a hole in the basement floor near the northeast corner of [fol. 44] the basement down into the soil below and I observed that the basement floor had been placed on a cinder fill, that that cinder fill had water in it. I further observed that the clay, that there was clay under the basement floor and that this clay when it was wet as it was became plastic and pliable.

I had my men establish level marks around the inside of the basement walls and from time to time observed readings on those marks to detect whether or not the building was moving. I also employed a strain gauge across it, at points across the cracks in the basement walls to determine whether or not those were moving, and after several months of observation during which time I did observe that the building was breathing and moving which investigation indicated to me that there was no evident indication that the building would collapse or fall down around people's heads, I suggest that we stop that type of investigation, patch up the conditions and live with it as best they could.

Q. Do you think this foundation could be fixed up so that there would be a reasonable guarantee that this wouldn't happen again in the future?

A. I tried to devise some sensible way of underpinning this building, but I did not come up with any economically sound.

Q. What kind do you think it would require, assuming you were not concerned for the moment about costs?

[fol. 45] A. I would require that either pipe fills or some sort of a post or column arrangement be placed at intervals under the basement walls down to a good, firm, unyielding material, perhaps 15, 20 feet below the surface.

Q. Is there any other method that might be devised that would accomplish a similar thing?

A. A general underpinning of the entire walls by placing a wider-spread footing, tying the whole foundation together as a mat might be employed, but neither of these, I guess, are economically practical. Just too expensive.

Q. Did you make any recommendation with respect to the grading of the lot?

A. Yes, it seemed to me that if we could arrest the surface water from settling around the house we could eliminate a great deal of the water under the building. With that in mind we prepared a plan showing several ways, troughs around the building which would lead the water and collect the water before it hit the building and lead it away from the house. That work was done by Mr. Neustadt.

Q. Is that a fairly substantial job?

A. It was. It took quite a little while, and to a great extent I think it has helped to take the water away from under the building, but there is still water under the building.

Q. The second of these two possibilities, pouring spread footings and typing them in, I am not quite sure I under- [fol. 46] stand that. I have heard of pouring additional footings under a house when you have settlement problems. Is that all you're talking about, or is it something more?

A. Well, it is in a few words, it is just the footings that are under the house today are two feet wide. I learned from the record here in the Alexandria Building Department. It would be necessary to have footings that were several feet wide, maybe four or five feet wide, maybe wider, to spread the load safely on this soft clay.

Q. And that would have to be throughout the foundation?

A. That would be done throughout and would be done in sections four feet at a time around the entire perimeter of the house and would be time-consuming job as well as an expensive one.

Q. I see.

Mr. Locraft, on the basis of your examination of the premises in August which you have just described to us, are you able to make an informed judgment as to whether there must have been evidences in mid-March of 1957 either of current settlement and structural damage or of indications that there was something to be concerned about in this area?

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[fol. 47] Q. Let me ask you specifically with respect to some of the things you mentioned earlier describing the house, you mentioned the place where there was a large crack that had been pointed up along the floor, first floor line which had had a transverse movement of about an inch.

A. That's correct.

Q. Are you able to say whether that crack had been present in March of 1957, from your examination in August?

[fol. 48] A. I would, of course I was not there in March, but from what I saw in August that crack had been there a long, a long time.

Q. How about this displacement of about an inch that you described, could that have taken place in this five-months period, or is that something takes place over a longer period of time?

A. No, that had been there a long period of time.

* * * *

[fol. 49] CROSS-EXAMINATION

BY MR. FITZGERALD:

Q. Mr. Locraft, did I understand you to say that the parlor floor sloped, too, sun parlor?

A. Yes, sir.

Q. And were you able to determine what might have caused that?

A. The settlement of the north wall across the entire house contributed to the settling of the floor.

Q. Was the sun parlor enclosed?

A. Partially enclosed. It is enclosed with, like a, with glass or something, make it an enclosed porch.

Q. Was it enclosed with brick at all?

A. Brick piers, posts of that nature.

Q. And you advised them to point up the cracks and live with it as best they could; is that correct?

A. In a few words that is it, sir.

Q. Can that be done? Can you conceal the cracks with [fol. 50] some success by pointing them up, painting over them?

A. Only temporarily. You can conceal the cracks, but they will reopen again when you do not know, maybe the next day, maybe the next couple of weeks, but they will continue to reopen.

Q. And if you do try to live with it, point them up, paint over them, you can keep them concealed temporarily?

A. Yes, sir.

* * * *

[fol. 51] Let me ask you, have you any reason which you could say as to why this defect did not appear some-

[fol. 52] time in 1945 or '46, five years after the house was built, or 1951, ten years after the house was built?

A. In my observation, as I went into the basement and looking around the outside, I would say those cracks could conceivably have been even of that age, maybe older.

Q. Maybe even older?

A. Yes.

Q. And if they were of that age, there'd been no guarantee that they were continuing or they might have just been original settlements; is that correct?

A. There again, sir, your're on the wrong premise. You do not build houses expecting them to settle.

Q. Well, I am trying to segregate these things, and if we were to look at the crack alone, not knowing what the house was built on, it is your testimony that it might have been there as much as ten years and might not be likely to further its condition?

A. It may have been there as much as ten years, but the fact that it was not likely to continue is not according to the fact, because I saw the freshly opened—

Q. Well, the likelihood or lack of likelihood of its continuing would be dependent upon what the house was built on, not it on, on the appearance of the pointed-up crack?

A. Yes, that's a good way to put it.

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[fol. 53] * * * *

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[fol. 54] HARRISON C. JACOBS

was called as a witness by counsel on behalf of the plaintiffs and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LATTO:

Q. Would you state your full name and address, Mr. Jacobs?

A. Harrison C. Jacobs. Business or home?

Q. Well, where are you employed?

A. 333 Third Street, Washington, D. C.

Q. And with whom?
A. I am with the Federal Housing Administration.
Q. What is your position with the F.H.A.?
A. Supervisor of inspectors.

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[fol. 55] Q. I'd like to shorten this as much as I can, Mr. Jacobs. Were you in the courtroom when Mr. Neustadt testified?
A. Yes, sir.
Q. And did you hear his testimony with respect to a visit or a number of visits that you made to his house?
A. Yes, sir.
Q. In July or possibly early August of 1957. He testified also that you told him that in your opinion a bad mistake had been made on the part of the F.H.A.; was his testimony accurate in that you did make such a statement to him?
A. I am not altogether sure about the F.H.A. part, but I realize that a mistake had been made of some nature, and that is the reason I advised him to enumerate each of the items that we discussed and then inform Mr. Elliott, our chief underwriter.
Q. What was the nature of the mistake that you considered had been made?
A. Well, it's kind of rehash, but cracks in the front, bad drainage, the apparent wrenching of the sun parlor from the house, and the big subsidence crack in the basement, plus the crack that the right-hand side or east wall, [fol. 56] I believe it is, in the basement, and then the large one in the front wall.
Q. Now, was it your view at the time that you inspected the house, and is it your opinion today that these evidences that you have just mentioned must have existed in March of 1957 when the inspection was made?
A. Without question; yes, sir.
Q. Was that your opinion?
A. Yes, sir.
Q. And it is your opinion now?
A. Yes, sir.

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[fols. 57-60] • • • •

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[fol. 61] CROSS-EXAMINATION

BY MR. FITZGERALD:

* * * *

Q. Now in your experience is it possible to point up [fol. 62] and paint over cracks which are the result of settling of foundation?

A. It's been my experience that you can do that, but if the original cause still prevails quite often you will get the reopening of those cracks.

Q. They will reopen, but can they be concealed temporarily by pointing and painting?

A. Yes, s .

Q. For approximately how long could a serious crack, and let me explain "serious" crack by saying that I mean a crack which comes from a serious cause, but maybe no wider than an ordinary crack in the building be covered, painted over and concealed by painting and pointing? How long a period could you conceal such a thing before it would reopen, approximately?

A. Hm-m, a real serious crack I venture to say would reopen within ninety days.

Q. Within ninety days?

A. Yes, sir.

Q. And in your experience do you ever come upon cracks which have been pointed and painted which are not the result of serious flaws in the house?

A. Yes, sir.

Q. Might there be a crack in this courtroom wall which is not the result of a serious failure?

A. Yes, sir.

[fol. 63] Q. Might it be pointed and painted?

A. Yes, sir, and never show up.

Q. What kind of cracks are those?

A. We term those shrinkage cracks.

Q. Shrinkage cracks?

A. Yes, sir.

Q. And if a crack has been pointed and painted, after it has been pointed and painted, is there any way for a person not experienced in architectural field to know what kind of a crack it is?

A. No, he wouldn't know, not in the architectural field; no, sir.

MR. FITZGERALD: That is all.

MR. LATTO: Let me ask you about the particular crack in this house. There has been some testimony about a crack in the basement on the east wall. That is the wall underneath the sun parlor, or which had been pointed up and painted, would that crack be observable, or could that crack have been covered up by paint, in your judgment?

THE WITNESS: By observing that crack that had been patched, I'd say offhand in my own opinion and experience that it had been a fairly wide crack and it wouldn't be too hard to tell.

BY MR. LATTO:

[fol. 64] Q. How about the crack we mentioned on the outside of the house on the first floor line where that had been, this transverse movement, was that something that could have been readily concealed by point and, pointing and painting?

A. No, sir.

Q. Was the ivy covering the front wall of the house at the time you saw it?

A. To a certain extent; yes, sir.

Q. Have you seen the picture of the house that is in evidence? This is the way it looked, or was there much more ivy on it at the time?

A. If I am not mistaken, there was a little more ivy on that.

Q. And did that interfere with your ability to find these cracks that you have mentioned?

A. No, sir.

Q. How about these I-beams in the basement, did you notice them?

A. Yes, sir.

Q. And what did they indicate to you?

A. That they'd been there quite some time. In other words, the installation of those hadn't been too recent.

Q. Was it evident that this was not part of the original construction of the house?

A. Oh, yes, sir.

[fol. 65] Q. If you were making an inspection and appraisal of the house, would the presence of I-beams of that sort indicate the need to you of a thoroughly careful examination with respect to settlement problems?

A. Yes, sir.

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[fol. 66] THOMAS CUNNINGHAM BARRINGER

was called as a witness by counsel on behalf of the plaintiffs and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LATTO:

Q. Would you state your full name, please, Mr. Barringer.

A. Thomas Cunningham Barringer, 301 Harvey Road, McLean, Virginia, Director of F.H.A., District of Columbia Insuring Office.

* * * * *

[fol. 67] Q. So that it will be perfectly clear to this, I know that are many programs that undertake to administer, all of my questions will be directed to the single question of the activity of the F.H.A. in connection with the insurance of mortgages on single-family dwellings, and that would be under, I guess, it is Title 2203 of the statute. Is that reference correct?

A. That's right.

Q. And the functions of the F.H.A. under that section of the National Housing Act include insurance of both new construction and old construction, is that right?

A. That's right.

Q. My questions will be directed only to the insurance of mortgages written on houses already constructed.

Can you tell us briefly what the principal division is in your office that are concerned with the function of the insurance of mortgages on single-family dwellings of this type?

A. Well, of course, there is the administrative side of the office that does the receiving of the applications.

There is the architectural section that on existing houses only, called in or making repair inspections, or for consultation on difficult cases. There is the evaluation section that takes the application of the property, the description, that goes out and makes the evaluation and [fol. 68] turns in the report. There is the mortgage credit section that passes on the purchaser after the appraisal has been made, if it's an application for a firm commitment, as we call them.

Q. Let me try to do this in a chronological way. Suppose, take the case of a person who owns a house and is interested in selling it, and believes that he may be able to get a better price or sell it more readily if he can assist in arranging for F.H.A. insurance on the financing that will be employed in the sale of a house, what should he do or what does he do if he reaches such a decision, or may he do anything, first of all?

A. He would have to go to some mortgagee, either himself, or through his broker, and make application for a conditional commitment, assuming that the purchaser is unknown.

Q. This is before he's even heard of a purchaser?

A. That's correct.

Q. He can have an application filed on his behalf or on behalf of the mortgagee for what you refer to as a conditional commitment?

A. That's right.

Q. What does the term conditional in that respect mean?

A. Well, conditional commitment means that we will appraise the house and state the amount of loan that we are willing to insure to an unknown borrower or unknown purchaser, and this conditional commitment would [fol. 69] be converted into a firm commitment if we accept the borrower as being qualified to carry the mortgage.

Q. Let's hold the borrower for a minute. What happens when this application is filed with the F.H.A. when it is received by you, what steps are taken in your office?

A. It is logged in. It's given a number, and it goes into the evaluation section and is assigned to an appraiser to go out and take a look at the property. He returns and make up his appraisal report, and then it is reviewed.

Q. Before that, let me ask this, on what form would his appraisal report be made?

A. Form 2710.

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[fol. 70] Q. • • •. Suppose that the contract for the purchase of a house had been made and as part of the conditions in that contract it was required that F.H.A. insurance in a certain amount be available, would there [fol. 71] be any different practice so far as the application for mortgage insurance is concerned? How would the application for mortgage insurance be filed in that case?

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A. Well, then customarily the buyer of the house goes to a mortgagee and requests that they file an application on his behalf for an F.H.A. commitment.

Q. What would be the reason for someone who owns a house to have such an application filed before he even knows who he might sell this house to?

A. Because he wants to ascertain what he thinks F.H.A. thinks the house is worth, and what amount of mortgage would be obtainable on his house under F.H.A. insurance feature.

Q. So that discussing the sale—

A. To a—in event that a suitable purchaser arrived, it is a time-saving facility.

Q. In discussing the possible sale with a future purchaser he can inform him that he's had the house ap- [fol. 72] praised, that a certain mortgage, if he can find a lender, will be insured by the F.H.A.?

A. Find a purchaser.

Q. Upon the proper controls in respect to the credit of the purchaser.

Now let me return to this form. This I take it is not the application for insurance that we are discussing; is that right?

A. No, this is an internal form of F.H.A. prepared by various sections of the office where they are effecting, they are in the process, where they contact the processing of the case.

Q. And a considerable portion of this form is completed by the person who makes the appraisal, the inspection and appraisal; is that correct?

A. Yes.

Q. Now let me come back to this item 31 which reads, Estimated cost of repairs, improvement proposed, and a blank for a certain number of dollars to be entered or required and a blank for a certain number of dollars to be added. What is the function of that particular entry on this form, and who was the person who would complete that particular line?

A. Under this form, performs a dual purpose. If it was new construction, then all of the architectural section would be filled in completely by the architectural section. [fol. 73] Q. Yes. You understand my yes is directed to old structure

A. If an evaluator and appraiser is looking at a piece of property in "as is" condition in order to arrive at his value he has to estimate the replacement cost of that property, and he has to take into account certain factors, but the value may not exceed the replacement cost. Having arrived at that figure, it is purely his judgment based on the experience data that we have as to size of the house, amenities. He then proceeds to make his appraisal based on the other factors involved, location, community, physical appearance, security, and what-have-you.

Q. Now this, you haven't yet mentioned the word repairs which appears on item 31. I am trying to discover what the function of that line is.

A. Well, he may look at the existing house and think that certain repairs should be done, or he may or may not consider them necessary, and he's taking them into his value when he made his appraisal.

Q. Let me come at this another way.

Do you have a copy of F.H.A. letter No. 1272 of August 11, 1952, before you?

A. I do.

Q. Would you turn to page, well—and does this document contain instructions to the people who are concerned [fol. 74] with the architectural processing of this Form 2017?

A. That is correct.

Q. Would you turn to page 6, down at the bottom of the page, you will find item 31. If I read that, since it is very brief. It says, Estimated cost of repairs or improvements proposed or required, in existing construction cases only, enter separately in the spaces provided the estimated cost of any repairs or improvements, a, parenthesis proposed by the mortgagor and b, in parenthesis, any additional repairs or improvements required by F.H.A. as essential to eligibility.

Now I want to direct your attention to this last phrase which begins with parenthetical b, in parenthesis, would you explain to the Court what is meant by additional repairs or improvements required as essential to eligibility?

A. Well, it is possible that we will see an existing house and we figure that, that if the certain improvement is made like new gutters or painting of the exterior or myriad of improvements that might take place to the property, we will give full value to the house, provided they are made the conditions of our commitment, that they be done.

Q. Now when this says essential to eligibility, does that mean in the event these repairs are not made that the F.H.A. will refuse to insure the property?

A. If we made the requirement, then we will not insure.

Q. Then you do have a practice of, in certain cases, of [fol. 75] imposing requirements before you will issue mortgage insurance?

A. Definitely.

Q. Can you tell us the kind of the situations in which those requirements will be imposed?

Well, for one thing the question of termite damage, been mentioned to the Court before, what happens if your inspector notices a serious evidence of termite damage in the house which is the subject of an application for mortgage insurance?

A. Well, if an appraiser sees evidence of termite, we make a condition on the commitment that a reputable firm proceed to cure this situation and give a five-year guarantee, and such evidence of that guarantee and working having been done is submitted with the papers to F.H.A. at the time of our insurance endorsement that the con-

dition has been complied with. An appraise may also go to an older house in an area that he suspects might have termites and see no evidence whatsoever but still require a lesser type.

Q. Yes, I understand.

A. Of examination by a competent exterminator, just to be sure that it is; it's a matter of judgment, wants to be certain.

* * * * *

[fol. 76] Q. Now suppose an inspector made an appraisal of the house and discovered evidence of serious settling and it was his judgment that there was danger, continued settling in the near future, what would these instructions require him to do?

A. Well, if the appraiser observed a serious settlement condition, he would, depending on his own experience, either make it a requirement for correction on the basis of what he knew, or he may suspend his appraisal operation and request a review by an architectural man in the office to determine the extent of the condition.

Q. Now suppose he did the latter and it was the same opinion, his opinion was shared by the man in the architectural section, namely, that there had been serious set-
[fol. 77] tling in this house and there was serious danger of continued settling in the uncertain future but a definite probability of continued settlement, what would then take place?

A. Well, he could reject it, recommend rejection of the application, and usually with the statement that it would be economically unfeasible to correct.

Q. Is it considered part of the function of the appraisers to determine whether there are conditions of this sort, termite damage, structural defect, which might make a particular property ineligible for F.H.A. insurance, to consider that as part of the functions of the appraiser?

A. That is definitely the part of the appraiser. He's an employee of F.H.A. and he'd look at the physical security from our point of view, and I suppose if he sees conditions that are detrimental to our security he is supposed to report them and to make such recommendations. That is in his judgment. It is a matter of judgment.

Q. And they would be noted on this form that we have been discussing?

A. They would be, if he saw them.

• • • •

[fol. 78] • • • •

• • • •

[fol. 79] CROSS EXAMINATION

BY MR. FITZGERALD:

Q. Is the purpose of the F.H.A. conditional commitment when the buyer is yet unknown, is it the purpose of that commitment, so the seller can use that as a sale point in talking with prospective purchasers?

A. Well, that's one of the uses. It is not the--

Q. Is that the F.H.A.'s purpose?

A. The F.H.A.'s purpose is to honor the request for an [fol. 80] appraisal. What use the buyers put it to we have no control over. He may want it for his own curiosity, for purposes of sale, determining many other factors, but so far as F.H.A. is concerned that is where it is most frequently used by many people.

Q. In the question which was asked you about termite damage, if an appraiser saw nothing to indicate to him that there was a presence of termites, is he required in each and every case to make a detailed inspection, sampling of timber, to find out whether or not they are present?

A. No.

Q. What is the duty of an appraiser as to the appearance of a house with regard to detailed inspections of what the appearance might not reveal, that is, latent or hidden qualities or defects?

A. Well, an appraiser may, it is a matter of experience and judgment, he determines the house in its "as is" condition, he finds obsolescence which has nothing to do with the latent defects. Ordinarily he may see a furnace in the summertime and he gives the house a full value for having an operating furnace, but he does not attempt to run it or check it other than the fact that he assumes that it is in working condition.

Q. Is that what he is required to do, or he is entitled to take his experiences at face value?

A. That's right. A dry cellar at the time of his in- [fol. 81] spection is supposed to be a dry cellar. May subsequently be quite different.

Q. That is all.

THE COURT: Mr. Barringer, in this particular instance who made the application for the insurance that led to this appraisal; do you know that?

• • • •

THE WITNESS: • • •

In answer to your question, the owner of the property requested an appraisal or conditional commitment on the property before the purchaser came into the picture.

THE COURT: Well; did the purchaser at any time [fol. 82] come into the picture as far as F.H.A. insurance is concerned?

THE WITNESS: Yes, subsequently having entered into a contract to buy the house, he filed through Thomas J. Fisher and Company, the mortgagee in Washington for approval of himself as the purchaser, that is being qualified to assume the mortgage that we had agreed to insure on the previous commitment.

THE COURT: Well—

THE WITNESS: We did accept him as the mortgagor and endorsed the note after settlement, and it is now an F.H.A.-insuranced note.

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[fols. 83-84] • • • •

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[fol. 85] MR. FITZGERALD: Put in 2710, Plaintiffs' Exhibit No. 12, which is Form 2710. It's introduced into evidence. 2017, introduced in evidence, in blank, is that given to the purchaser or something else?

THE WITNESS: No, at the time that we issue the commitment and send it to the mortgagee we accompany it with a statement of F.H.A. appraisal Form 2562 which shows what, also shows on the commitment itself, the F.H.A. appraised value. The forms for the purpose of [fol. 86] the mortgagee getting to the home owner or the

seller of the property a piece of paper that gives him the appraisal in advance of his entering into a contract. If he does not enter into a contract, he fills out the lower part of the form which amends the contract that he may eventually sign.

BY MR. FITZGERALD:

Q. Now that advice to him from the F.H.A., does that say anything about the house, such as its grounds, its building, or does it describe it in any way, or have anything on it with reference to question 30 and 31 which we have gone into briefly about required repairs or improvements, anything like that on it?

A. Nothing at all. It only has the dollar value of our appraisal, and specifically says the F.H.A. appraised value does not establish the sales price.

Q. That is all.

BY MR. LATTO:

Q. Mr. Barringer, suppose I had entered into a contract which was conditioned on F.H.A. insurance in a certain amount being available for me, to be required to complete that contract and it had been determined by the F.H.A. that this particular property was ineligible for any reason whatever for the mortgage insurance, what would happen at that point? Would this information come to the attention of the purchaser and the seller of the house? [fol. 87] A. Very definitely. We would issue a form known as report on application which in various types of language says a reject.

Q. And this information would come back to the people concerned?

A. That's correct.

MR. FITZGERALD: That's all.

(The witness stepped down.)

Thereupon,

RANDALL J. HICKS

was called as a witness by counsel on behalf of the plaintiffs and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LATTO:

Q. Would you give us your full name, please, Mr. Hicks.
A. Randall J. Hicks.
Q. What is your business address?
A. 3706 Mount Vernon Avenue, Alexandria, Virginia.
Q. And what is your business?
A. Real estate broker.
Q. How long have you been engaged in this business?
A. Fifteen years.
Q. Have you in the course of your occupation as a real estate broker done very much appraising of single-family [fol. 88] dwellings?
A. In the last twelve years I have done a good bit of appraisal.
Q. Tell us something about the nature of your experience in this area.
A. Of course, the majority of my appraising is residential property insofar as my business is concerned. I do condemnation appraising. I do estate appraising. I do appraising for the courts, various types and nature.
Q. Did you in October of 1957 at my request furnish me with an appraisal of the fair market value of property at 1408 Oakcrest Drive in Alexandria?
A. I have a report of such an appraisal to Mr. Neustadt on October 31, 1957.

• • • •

Q. And can you tell the Court what your opinion was as to the fair market value of this property?
A. Well, first I'd like to preface my remarks by saying [fol. 89] that a fair market value of a house in the condition this was at that time had a good deal of guesswork based on experience because in appraising, to do it accurately and scientifically, you not only have to take in certain factors, but additionally you should have comparables

to make sure to check out your information—is correct—and on this particular house I knew of no comparables and, therefore, I could not arrive at any accurate value based on comparables, so I had to do it on the basis of estimated repair which would bring it up to its condition which preceded it, before this settlement took place.

At that time I estimated the value of the property at thirteen thousand, figuring it would take the difference between that and $24,000 odd to put it in good condition, and there again it was more or less of an estimate based on observation because I could get no one to give me a firm bid on the condition it was in.

Q. Let me ask you this. Do you think the market value was precisely equal to the difference between what it would be worth if it were in perfect condition and what it was worth in the condition in which you saw it? Would the difference of repairing the house be the sole difference in the market value? I don't know if I made that question clear.

Let me rephrase it, if I may.

Would you say that the market value of the house in [fol. 90] the condition in which you saw it would be determined by simply subtracting from what its fair market value would have been had it been in perfect condition, the cost of repairing, the damage, that you saw?

A. Well, that is just simply one approach. Of course, there is no way for anyone to tell, at least no way for me to tell what someone would come along and offer cash for that house in that same condition. To get someone to do that, I think they would do just what I did. They first find on it as accurately as possible what it would cost to put it in A-1 condition, and then you'd subtract that from what the market value would be in A-1 condition, and that, presumably, would be what it's worth in its present condition.

Q. Well, the things I am struggling with, is this—suppose we take two houses which are identical in the same neighborhood and they are identical except for the fact that one of them has a serious structural defect of some kind. If I were a possible purchaser of one of these two houses, do you think that I would be as willing to pay $5,000 less for the house that was in poor condition if I

thought it would cost me $5,000 to repair it, or would I prefer to have the house that was in good condition without paying anything to repair it?

A. I don't think I can give you an honest answer there because you are asking me to tell you what someone else would do. Now based on my experience, people, if a [fol. 91] house is in good condition at the time they purchase it, they don't quibble about what it might cost to put it in good repair in case it becomes necessary to repair it later, so I couldn't accurately answer your question in that respect.

Q. Well, let me ask you this. I am reading from the appraisal report that you submitted to Mr. Neustadt, October 31, and you said any prospective purchaser would obviously prefer to purchase a substantially similar house in good condition at a price equal to its market value rather than pay a price for this property equal to its former market value, reduced by the probable cost of correcting the present condition.

Now that is what I had in mind.

A. That was an opinion that, therefore, I had reduced the price of the present market value to that extent. I mean the thirteen thousand took into consideration that that would, might happen.

* * * *

[fols. 92-123] * * * *

* * * *

[fol. 124] MRS. R. H. HUBBARD

was called as a witness by counsel on behalf of the Government and, having been first duly sworn, was examined and testified as follows:

* * * *

[fols. 125-129] * * * *

* * * *

[fol. 130] CROSS-EXAMINATION

BY MR. LATTO:

Q. Were you here during Mr. Neustadt's testimony?

A. Yes, I was.

Q. He testified to certain conversations with you with respect to the F.H.A. appraisal. Do you recall that testimony?

A. Yes, sir.

Q. At one point he said he testified that after the first F.H.A. appraisal was received, he telephoned you to find out whether that might possibly mean that there was any structural defect in the house. Do you recall that conversation with him?

A. I do recall a conversation but I believe it was with Mrs. Neustadt, but I am sure that one of them called me.

Q. He went on to testify that he was informed by you that it was a practice of the F.H.A. either to refuse to insure a house or to condition their insurance upon a substantial defect being remedied, if there was one. Do you [fol. 131] recall giving him that information?

A. Well, it sounds very much like me because I have firmly believed that.

Q. Now would you say this information about F.H.A. practice is commonly known?

A. Yes, I always believed that the F.H.A. would not insure a loan or on a house that wasn't worth it, and I always thought that was a very excellent yardstick, so I would say that that sounds very much like me.

Q. You don't recall the particular words but you certainly wouldn't deny that you gave him that information?

A. I couldn't deny if Mr. Neustadt said I said that. I would believe I had.

Q. That is all.

MR. FITZGERALD: That is all.

Mr. Wharton.

Thereupon,

HENRY REDWOOD WHARTON, III

was called as a witness by counsel on behalf of the Government and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FITZGERALD:

• • • •

[fol. 132] Q. What is your occupation?

A. Real estate.

Q. And in connection with real estate do you do any appraising?

A. I do.

Q. For how long a period have you done so?

A. Well, for fourteen years, as long as I have been in the business.

Q. Have you engaged in any special training or courses to enhance your ability to do appraisal work?

A. Yes. I have taken the American University, both courses in Appraisal I and another Appraisal II. Those are both courses set up by the American Institute of Real Estate Appraisers in Chicago. I passed both of them.

• • • •

[fol. 133] Q. Mr. Wharton, in connection with your physical inspection of the property what do you do?

A. Well, let me start with a definition of appraisal to begin with. It's an estimate of value made by the appraiser, and it has to be made on the basis of his—well, [fol. 134] let me start again.

It is his evaluation based on the observed condition of the property at the time he looks at it.

Q. And in connection with the observed condition of the property do you make a detailed physical inspection?

A. Yes, you do.

Q. And in connection with that physical inspection what did you accept as fact and what do you question and inquire further?

A. Well, an appraiser is not required to be a construction analyst. He just has to take what he sees and appraise it as it is and as he sees it.

Q. There was some testimony the last day of trial about the situation presented by a furnace on a house being appraised on a day like today. What would be the duty of an appraiser there as to the condition of that furnace?

A. Well, I can only go along with Mr. Barringer, who,

of course, is an F.H.A. man. He says that they have to assume that furnace is a working furnace even though they don't see it in operation.

Q. And did I ask you to inquire and for your professional judgment on what the duties of an apprais are in this field?

A. Yes.

Q. And did you consult some research?

A. I certainly did.

[fol. 135] Q. Works or books and other people in the field?

A. I did.

Q. And are you able to tell us about the foundation of a house which is under appraisal, if the appraiser does not detect any noticeable faults in the foundation, whether he is required to look further?

A. Generally I would say not, if everything looks all right. The appraiser is normally expected to be satisfied.

Q. And would it, your judgment be affected in any way by the fact that the house was built some eighteen or sixteen years earlier than the appraisal?

A. Well, age is always a factor in appraisal, have to consider that.

Q. Well, in connection with an appraisal, work, do you sometimes come upon cracks in the wall of a house which have been covered up or pointed up and then painted over?

A. Very frequently.

Q. And ordinarily what do they represent?

A. That is a very general question. I—

Q. Well, do they—

A. Settlement cracks, all kinds of degrees of settlement cracks.

Q. And are there different kinds of cracks, cracks other than settlement cracks?

A. Yes, there's cracks from shrinkage and that sort of [fol. 136] thing.

Q. And in connection with settlement cracks, does that indicate any major structural fault or flaw in the house?

A. Not necessarily. Every house when it is first built is going to have some settlement. Most houses, if they

are properly built, will have most of the settlement in I would say the first eight to ten years of their lives.

. . . . .

[fols. 137-139] . . . . .

. . . . .

[fol. 140] BY MR. FITZGERALD:

Q Mr. Wharton, assuming that any defects which later developed or became evident in the house had been pointed up, including those described by Mr. Locraft, that is the outside defect, and any cracks which can be pointed up and painted were so treated, and that there was, what-[fol. 141] ever, half-inch slope in certain rooms, would you say that it would be the ordinary prudent appraiser would be entitled to assume that that house was structurally sound or had the average structural soundness for the value he was putting on the house?

A. That is a difficult question to answer. Are you saying that if the house were fixed up now and painted up to look—I feel that the house is different, the condition is different now from what it was at the time the F.H.A. appraiser looked at it, quite a bit different.

Q. I am trying to—I think you're stating the Government's position accurately there, and I am trying to extract your expert judgment on the, what the duty of the reasonable and prudent appraiser would have been in March, March 14, on the condition of the house in its decorated condition, and I am trying to give you as an assumption the facts which Mrs. Hubbard and some of the other witnesses testified to as a fresh, clean, redecorated house, including Mr. Locraft, statement about a pointed-up crack on the front wall and the other cracks corrected.

A. Based on the testimony I have heard here, where certainly four people, maybe more, looked at that house at the time of purchase, the purchase was made, I think that the appraiser did do the job he was supposed to do. Certainly if these people had any doubts, they should have had it looked into at the time. But they were all satisfied [fol. 142] from what they saw that it was all right.

. . . . .

DUPLICATE

[fol. 143] GOVERNMENT'S EXHIBIT No. 2

To be prepared in duplicate and accompany the commitment; both original and copy to be delivered to purchaser; the duplicate copy to be signed by purchaser and delivered to FHA by mortgagee with ☐ Application for conversion or change of borrower. ☒ Closing instruments.

FEDERAL HOUSING ADMINISTRATION

STATEMENT OF FHA APPRAISAL

Case No. 54-112923

In compliance with Section 226 of the National Housing Act, as amended, the Federal Housing Commissioner has appraised the property identified by the captioned case number, and for mortgage insurance purposes has placed an FHA-appraised value of $22,750 on such property as of the date of this statement. (*The FHA appraised value does not establish sales price.*) This statement of FHA appraisal does not indicate that the Federal Housing Commissioner has approved a purchaser of the property as a mortgagor for an FHA-insured mortgage, nor does it indicate the maximum amount of any insured mortgage that would be approved for an individual mortgagor.

Date—June 4, 1957

J. C. Tracy Authorized Agent

MORTGAGOR'S CERTIFICATION

Check applicable box—

☐ Sale of property not involved; dwelling was constructed by the undersigned for his own occupancy.

☐ The original of this statement was given to me prior to my signing any contract to purchase the above-identified property.

☒ The FHA Statement of Appraisal value was not received by me prior to my signing the contract to pur-

chase, but the contract to purchase contained the following language:

"It is expressly agreed that, notwithstanding any other provisions of this contract, the purchaser shall not be obligated to complete the purchase of the property described herein or to incur any penalty by forfeiture of earnest money deposits or otherwise unless the seller has delivered to the purchaser a written statement issued by the Federal Housing Commissioner setting forth the appraised value of the property for mortgage insurance purposes of not less than $22,750.00, which statement the seller hereby agrees to deliver to the purchaser promptly after such appraised value statement is made available to the seller."

"The purchaser shall, however, have the privilege and option of proceeding with the consummation of this contract without regard to the amount of the appraised valuation made by the Federal Housing Commissioner."

Date—July 2nd, 1957.

/s/ Rose-Barbara J. Neustadt

/s/ Stanley S. Neustadt
Purchaser

[fol. 144] PLAINTIFF'S EXHIBIT No. 13

FEDERAL HOUSING ADMINISTRATION
Washington 25, D. C.

Architectural Analysis
Arch. (4)

August 11, 1952
No. 1272
Supersedes No. 889

TO: DIRECTORS OF ALL FIELD OFFICES

SUBJECT: UNDERWRITING REPORT—FORM 2017—REVISED MARCH 1952—ARCHITECTURAL PROCESSING

This letter with the instructions herein set forth supersedes Letter No. 889 which shall be retained in the Architectural Section until the current supply of the Underwriting Report, Form 2017 has become depleted and the March 1952 revision is placed in use. The instructions hereinafter set forth shall then be made effective.

Underwriting Report, Form 2017, is used in reporting the results of processing all applications for mortgage insurance involving Amenity Income Properties. The Underwriting Report is divided into three parts, namely, Architectural Report, Valuation Report and Mortgage Credit Report. The instructions in this letter pertain to the preparation of the Architectural Report by the Architectural Section.

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[fol. 145] *31. Estimated Cost of Repairs or Improvements Proposed or Required:* In existing construction cases only, enter separately in the spaces provided the estimated cost of any repairs or improvements (a) proposed by the mortgagor and (b) any additional repairs or improvements required by FHA as essential to eligibility.

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[fol. 145A] PLAINTIFF'S EXHIBIT 15

FEDERAL HOUSING ADMINISTRATION
Washington 25, D. C.

February 10, 1955

Operations Letter
No. 121

To: DIRECTORS OF ALL FIELD OFFICES

SUBJECT: STATEMENT OF FHA APPRAISAL—FHA FORM 2562

Section 226 of the National Housing Act, as amended by the Housing Act of 1954, requires that purchasers of FHA insured properties receive a statement of the FHA appraisal prior to execution of the sales contract. The intent and purpose of Section 226 is to give a prospective purchaser of a property informed judgment as to its reasonable value.

To implement Section 226 of the Act and to prevent rejection of cases in which sales contracts were executed prior to filing of application for mortgage insurance, language was provided in FHA Form 2562 which could be used in amending the sales contract. However, there appears to be some misunderstanding as to what is required with respect to the dollar amount which is to be inserted in the amendatory language. It is obvious, of course, that unless a reasonable dollar amount is used in the amendatory language the purchaser does not have the protection intended by the legislation, which is to permit his withdrawal from the contract in the event the FHA valuation is not equal to the amount set forth in the clause.

• • • •

[fol. 146] UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 8071.

UNITED STATES OF AMERICA, APPELLANT,

versus

STANLEY S. NEUSTADT and
ROSE-BARBARA Y. NEUSTADT, APPELLEES.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.
Albert V. Bryan, District Judge.

(Argued May 31, 1960)

OPINION—Filed August 19, 1960.

Before SOPER and BOREMAN, Circuit Judges, and BARKSDALE, District Judge.

Morton Hollander, Attorney, Department of Justice, (George Cochran Doub, Assistant Attorney General, Joseph S. Bambacus, United States Attorney, Samuel D. Slade and William A. Montgomery, Attorneys, Department of Justice, on brief) for Appellant, and Lawrence J. Latto for Appellees.

[fol. 147] SOPER, Circuit Judge:

The question in this case is whether the purchaser of a single residence property covered by a mortgage under § 203(a) of the National Housing Act as amended, 12 U.S.C. § 1709(a), is entitled under the Federal Tort

Claims Act, 28 U.S.C. § 2671 et seq, to recover damages occasioned by the negligence of an agent of the Federal Housing Commissioner in making an appraisal of the property under the provisions of the state and the regulations issued pursuant thereto. See 12 U.S.C. § 1709(b)(2) and 24 C.F.R. § 200.4(b). The United States does not deny that the appraisal was faulty or that the purchasers were injured thereby but defends on the ground that the plaintiffs' claim arises out of misrepresentation which is excluded from the coverage of the Tort Claims Act by 28 U.S.C. § 2680(h).

The property is located in Alexandria, Virginia. The former owners, in anticipation of selling it, caused an approved lender to make application under 12 U.S.C. § 1709(a) of the Act for a conditional commitment to insure the mortgage and pursuant thereto the property was inspected by an FHA appraiser, who reported that the property was eligible for mortgage at the appraised value of $22,750. The plaintiffs as prospective purchasers were apprised of this fact. Thereupon a contract of sale was executed conditioned upon the purchasers obtaining a loan secured by an FHA mortgage in the sum of $18,800. Therein the sellers agreed to furnish the plaintiffs a written statement of the appraised value as so determined, and this was done upon the settlement date when the purchasers took title to the property.

[fol. 148] The purchasers took possession of the house and several days later substantial cracks appeared in the interior walls and ceilings in all of the rooms, as well as in the cinder blocks in the basement walls. It was then found by FHA officials that cracks were appearing in the exterior walls, and that the one-story sun porch was separating from the east wall, and that the foundations were settling in an unusual manner. These conditions were found to have been caused by the character of the subsoil, which contained a type of clay that quickly disintegrates when exposed to water; and it was ascertained that the underpinning of the foundations would require the expenditure of several thousand dollars.

The pending case was then brought and tried before the District Judge without a jury, who rendered a verdict in favor of the plaintiffs for $8000. The judge called atten-

tion to the amendment to the statute by the act of Congress of August 2, 1954, codified in 28 U.S.C. § 1715(q), whereby the seller of a dwelling approved for mortgage insurance under the state is required to agree to deliver to the purchaser prior to the sale a written statement setting forth the amount of the appraised value of the property as determined by the Commissioner. The Judge held that the statute as amended imposes upon the United States the duty to appraise the property with ordinary care and diligence as a gauge of the fairness of the price to be paid by the purchaser and that neglect of this duty makes the United States liable to the purchaser. He was of the opinion that the appraisal involves not merely a representation on the part of the United States but the performance of a positive act by the government as a direct and immediate service to the purchasers. He found that in this case the plaintiffs, in good faith, relied upon [fol. 149] the appraisal in consummating the purchase and, since serious structural defects in the house subsequently appeared which reasonable care by a qualified appraiser would have discovered, the negligence of the government to perform its statutory duty entitled the plaintiffs to recover the direct loss of $8000 resulting therefrom. Accordingly, a judgment for this amount was rendered against the United States.

The United States on this appeal relies upon the exclusionary section of the Tort Claims Act, which declares in 28 U.S.C. § 2680(h) that the provisions of the statute shall not apply, inter alia, to any claim rising out of misrepresentation or deceit. It has been uniformly held that "misrepresentation" in this context, since it appears in the act in juxtaposition to "deceit", means negligent as well as wilful misrepresentation.[1] We are in accord with this view especially as it is reasonable to suppose that Congress intended to exempt the Government from liability

[1] Jones v. United States, 2 Cir., 207 F.2d 563, cert. den., 347 U.S. 921; National Mfg. Co. v. United States, 8 Cir., 210 F.2d 263, 275-276, cert. den., 347 U.S. 967; Clark v. United States, 9 Cir., 218 F.2d 446, 452; Miller Harness Co. v. United States, 2 Cir., 241 F.2d 781; Anglo-American & Overseas Corp. v. United States, 2 Cir., 242 F.2d 236; Hall v. United States, 10 Cir., 274 F.2d 69.

for misinformation carelessly given by its agents to the public in the wide field of its manifold activities.[2] The Government therefore contends that it has no liability in the pending case, and in support of its position cites a [fol. 150] number of cases in the federal courts, analyzed in footnote,[3] in which, under varying circumstances, it has

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[2] In National Mfg. Co. v. United States, 8 Cir., 210 F.2d 263, 276, the court said that the intent of the section is to except from the Act cases where mere "talk" or mere failure "to talk" on the part of a government employee is asserted as the proximate cause of damage sought to be recovered from the United States.

[3] In Anglo-American & Overseas Corp. v. United States, S.D. N.Y., 144 F. Supp. 635, affirmed 2 Cir., 242 F.2d 236, a merchant purchased certain lots of imported tomato paste, relying upon the fact that it had been admitted into the United States after examination by agents of the United States pursuant to the Pure Food, Drug and Cosmetics Act. Later the merchant endeavored to sell the goods to the United States but they were rejected and condemned because they were found to be adulterated. It was held that the plaintiff could not recover because the duty imposed upon the United States under the statute was owed to the consumers and not to the dealer and, also, because the plaintiff's injury grew out of misrepresentation within the exception of the Tort Claims Act which was applicable, although the misrepresentation flowed from negligence in testing the goods.

In Hall v. United States, 10 Cir., 274 F.2d 69, the plaintiff, who was engaged in the cattle business in New Mexico, complained that he was injured when agents of the United States Department of Agriculture engaged in testing livestock for disease informed him that his cattle were diseased, causing him to sell them for less than their market value, whereas in fact there were no diseased cattle in the herd. It was held that the plaintiff could not recover because the loss was caused, not by the faulty testing of the herd, but by the misrepresentations of the government agents. Whether the duty to inspect was owed to the general public or to the plaintiff was not considered.

In Jones v. United States, 2 Cir., 207 F.2d 563, cert. den. 347 U.S. 921, the plaintiffs sued for loss incurred when they sold their stock in an oil company for less than it was worth after they had asked the United States Geological Survey for information as to the ultimate recovery of oil to be expected from the company's lands and were told, as the result of a negligent estimate by an agent of the United States, that the expected recovery was far less than it turned out to be. It was held that the suit was based on misrepresentation, for which recovery was barred under the statute. Whether the government owed any duty to the plaintiffs

been exonerated from liability for damages caused by negligent misrepresentation of its agents. We can discern no clear line running through these cases which serves as a guide to the solution of the present controversy. In most of them liability could be based only upon misrepresentation by agents of the government since the actions complained of were carried on for the benefit of the public at large and not in the performance of a specific

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was not discussed, but it was pointed out in the opinion of the District Judge, 120 F. Supp. 894, that the members of the geological survey are forbidden by the statute, 43 U.S.C. §31, to execute surveys or examinations for private parties.

In Clark v. United States, 9 Cir., 218 F.2d 446, it was held that the United States was not liable for damages to persons and property caused by flood in the Columbia River, since the evidence showed no negligence on the part of the United States either in its precautions to prevent the flooding of lands or in the issuance of a bulletin to the public to the effect that the flood situation was not dangerous. The court added that even if the flood should have been foreseen and the bulletin was negligently issued, the government was not liable since the misrepresentation therein involved fell within the exception of the Tort Claims Act.

Again, in National Mfg. Co. v. United States, 8 Cir., 210 F.2d 263, cert. den. 347 U.S. 967, the liability of the United States for dissemination by its agents of erroneous flood and weather reports was before the courts. It was held that the government was exonerated from liability for damages from flood waters by the express provision set out in the flood control act and that this provision was broad enough to bar recovery for damages caused by the negligence of government agents in circulating flood and weather reports; and it was also held that negligent conduct in the dissemination of erroneous reports was within the misrepresentation exception of the Tort Claims Act.

In Miller Harness Co. v. United States, 2 Cir., 241 F.2d 781, the plaintiff purchased from the United States certain surplus property described as saddle parts in the invitation to bidders wherein bidders were cautioned to inspect the property, and it was expressly stated that the government made no guarantee as to quantity, kind, character or description. The plaintiff being uncertain as to the character of the saddle parts, telephoned the custodian of the government depot and was told that stirrup irons and stirrup leathers were included in the item. Accordingly, the plaintiff bought the goods; but when they were delivered no stirrup parts or stirrup leathers were included and accordingly he brought suit for their reasonable value. Judgment went against him on the ground that his claim was based merely on misrepresentation.

duty owed to the injured party, *Clark* v. *United States*, 9 Cir., 218 F.2d 446; *Anglo-American & Overseas Corp.* v. *United States*, 2 Cir., 242 F.2d 236; or the statute or contract governing the activity expressly exempted the government from liability for the acts of its agent, *Jones* v. *United States*, 2 Cir., 207 F.2d 563, cert. den. 347 U.S. 921; *National Mfg. Co.* v. *United States*, 8 Cir., 210 F.2d 263. [fol. 151] On the other hand, it has been held that if the government assumes a duty and negligently performs it, a party injured thereby may recover damages from the United States even though the careless performance of the duty may have been accompanied by some misrepresentation of fact. Thus in *Otness* v. *United States*, D.C., Alaska, 178 F. Supp. 647, a shipowner sued to recover for the loss of his vessel due to collision with a submerged channel light which the Coast Guard undertook to locate but negligently failed to find, whereupon it issued an erroneous bulletin that no part of the light remained above the bottom of the sea. It was held that although the bulletin contained a misrepresentation of facts, this did not bring the case within the exemption of the Tort Claims Act or absolve the United States from liability for the negligent performance of a duty which it had voluntarily assumed. In like manner, the United States was held liable under the Federal Tort Claims Act for the negligent operation of a lighthouse in *Indian Towing Co.* v. *United States*, 350 U.S. 61, and for the negligent marking of a wreck in *Somerset Seafood Co.* v. *United States*, 4 Cir., 193 F.2d [fol. 152] 631. In each case liability was based upon the negligent performance of a duty assumed by or resting upon the government. There was no discussion in either case of the statutory exemption of the United States for liability for misrepresentation, but, as pointed out by the District Judge in the court below, misrepresentation was necessarily involved in the negligent marking of the wreck in one case and in the absence of notice of peril to the mariner in the other.

The record in the instant case discloses that the government owed a specific duty to the plaintiffs as purchasers of the property and that they suffered substantial loss from the careless manner in which the duty was performed. The scheme of the National Housing Act, 12

U.S.C. § 1709(a), under which the purchase was made endows the Federal Housing Commissioner with power to [fol. 153] insure a mortgage on a single family residence property if the mortgage complies with certain statutory requirements and involves a principal obligation not in excess of specified fractions of the appraised value of the property, which are placed very high in order to aid a prospective buyer with limited capital to acquire a residence. Application for the insurance must be made by an approved financial institution and frequently is made in advance of the execution of the mortgage. On receipt of the application an appraisal of the property is made to determine whether it meets the standards prescribed by the Commissioner and to fix a valuation for insurance purposes. If the property is approved, a conditional commitment is made to the applicant wherein the Commissioner agrees to insure the property in an amount computed upon its appraised value provided it is found that the purchaser is financially able to carry the mortgage. Obviously the appraisal of the property is an important part of the process. To accomplish this the appraiser inspects the property to ascertain its condition and eligibility and, if if is found eligible, makes an appraisal based on its long-time economic value.

This procedure was designed to effectuate the purpose of the Act, to encourage the construction of housing by giving aid to prospective purchasers, and at the same time to protect the government from a loss that would be incurred by insuring undesirable property. In 1954, the purpose of Congress to protect the purchaser was emphasized and further advanced by the addition to the statute of the amendment set out in 28 U.S.C. § 1715(q) referred to above. This Act directed the Commissioner to require the seller of residential property, covered by an approved mortgage under the statute, to deliver to the purchaser a written statement setting forh the amount of the appraised [fol. 154] value as determined by the Housing Commissioner. The purpose of the new act to inform the purchaser of the value placed upon the property by government appraisal for his own guidance is clear upon the face of the enactment. If there were any doubt about it, it is made clear by the legislative history.

The Senate report upon the National Housing Act of 1954 contains a section entitled "The Protection of the Consumer" in which it was indicated that there was need for a change in the philosophy of the Federal Housing Administration in the administration of the statute, so that the agency, while keeping in mind the objectives of the Act to maintain a high limit of housing production and to protect the insurance fund and the mortgagee from loss, would recognize its responsibility to protect the public interest in general and the rights of homeowners in particular, and at all times to regard it as a primary responsibility to act in the interest of the individual home purchaser and protect him to the extent feasible. See 2 U.C. Code Congressional and Administrative News, p. 2726. The conference report on the measure emphasizes the same purpose. It pointed out that, notwithstanding the fact that there is no technical relationship between the FHA and the individual, it was the intent of Congress that the procedures of the administration should not be used exclusively for the protection of the government and its fund, and attention was drawn to the specific provision of the amended act which requires that the purchaser be given a written statement setting forth the FHA's appraised value of the property so that the purchaser may be informed as to the amount that would be warranted in making the purchase. 2 U.S. Code Congressional and Administrative News, p. 2828.

[fol. 155] Thus, it is abundantly clear that the government owed a specific duty to the plaintiffs in this case even though there was no contractual relationship between them. The situation is similar to that considered by Judge Cardozo in *Glanzer* v. *Sheppard*, 233 N.Y. 236, where it was held that a public weigher, who was employed by the seller of goods and overstated the weight of the merchandise, was liable in damages to the buyer who bought them on the faith of the weigher's certificate. It was pointed out in the opinion that the defendant was not held merely for careless words but for the careless performance of the act of weighing.

So in the pending case, the wrongful conduct complained of does not consist merely or chiefly in the com-

munication to the plaintiffs whereby they were notified that the Housing Commissioner had appraised the property for mortgage purposes at $22,750, but primarily in the negligent appraisal itself whereby they were led to pay more for the property than it was worth. The government takes the narrow ground that the purchasers' loss was not occasioned by the negligent appraisal but by the misrepresentation in the government's report of the appraisal. The communication itself however was not, strictly speaking, a misrepresentation of fact, for it correctly reported that the Commissioner had appraised the property and placed a valuation upon it of $22,750, both of which statements were true. It cannot be denied, however, that there was an element of misrepresentation of fact in the government's conduct when the transaction is considered as a whole. The report sent to the purchasers purported to be and might fairly be accepted by them as an accurate appraisal of the value of the property carefully made so that in effect it amounted to a misstatement [fol. 156] of fact. Hence it might form the basis of an action for misrepresentation under general common-law principles, for it is generally held that one who supplies information for the guidance of others in their business is liable for harm to those who rely upon the information if there has been negligence in obtaining and communicating it, and the person harmed is one for whose guidance the information was supplied. Restatement of Torts, § 552; Prosser on Torts, p. 543.

It does not necessarily follow, however, that the case falls within the exemption of the Tort Claims Act, since it involves not only misrepresentation but also negligent performance of a definite duty owed to the plaintiffs. The real question is whether it was the intent of Congress to absolve the government from liability in every case in which misrepresentation plays merely a part. Misrepresentation, as Prosser shows, runs all through the law of torts and there are many types of wrongful conduct in which there are elements of misrepresentation that are usually grouped under categories of their own. Thus, as the author says (p. 520):

> "* * * A great many of the common and familiar forms of negligent conduct, resulting in invasions of

> tangible interests of person or property, are in their essence nothing more than misrepresentation, from a misleading signal by a driver of an automobile about to make a turn, or an assurance that a danger does not exist, to false statements or non-disclosure of a latent defect by one who is under a duty to give warning. In addition, misrepresentation may play an important part in the invasion of intangible interests, in such torts as defamation, malicious prosecution, or interference with contractual relations. In all such [fol. 157] cases the particular form which the defendant's conduct has taken has become relatively unimportant, and misrepresentation has been merged to such an extent with other kinds of misconduct that neither the courts nor legal writers have found any occasion to regard it as a separate basis of liability."

In view of this situation we do not think that the government is necessarily absolved from liability in every case of wrongful conduct on its part which incidentally embraces misrepresentation. It is abhorrent to common sense to hold that the government can relieve itself from liability for neglect of duty owed to an individual merely by telling him falsely that the duty has been faithfully performed; and it cannot be supposed that Congress had any such idea in mind when it included "misrepresentation" among the exceptions to the statute. Quite clearly the gist of the offense in this case was the careless making of an excessive appraisal so that the home seeker, whom the Commissioner was obligated to protect, was deceived and suffered substantial loss. This was the gravamen of the offense to which the report of the Commissioner was merely incidental. Accordingly, the judgment of the District Court is affirmed.

Affirmed.

[fol. 158] UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 8071.

UNITED STATES OF AMERICA, APPELLANT,

vs.

STANLEY S. NEUSTADT and ROSE-BARBARA Y. NEUSTADT, APPELLEES.

JUDGMENT—April 19, 1960

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

MORRIS A. SOPER
United States Circuit Judge.

HERBERT S. BOREMAN
United States Circuit Judge.

A. D. BARKSDALE
United States District Judge.

FILED AUG 19 1960 R.M.F. Williams, Jr. Clerk

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[fol. 159] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 169] SUPREME COURT OF THE UNITED STATES

No. 533, October Term, 1960

UNITED STATES, PETITIONER,

vs.

STANLEY S. NEUSTADT, ET AL.

ORDER ALLOWING CERTIORARI—December 19, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1961 583422 685

No. 533

In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, PETITIONER

v.

STANLEY S. NEUSTADT, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

STANLEY S. NEUSTADT, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on August 19, 1960.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Virginia (R. 57–60)[1] is unreported. The opinion of the court of appeals (App., *infra*, pp. 21–32) is reported at 281 F. 2d 596.

[1] Throughout this petition record references are to the appendix to the Government's brief in the court of appeals.

JURISDICTION

The judgment of the court of appeals (App., *infra*, p. 33) was entered on August 19, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether an appraisal of private property by an appraiser of the Federal Housing Administration, made for purposes of Government insurance of a private mortgage, gives rise to an actionable duty of care to one who becomes a purchaser of the property.

2. Whether a tort claim, based upon a statement reflecting an inaccurate FHA appraisal and communicated to the purchaser of property made subject to a Government insured mortgage, is excepted from the Federal Tort Claims Act as a "claim arising out of * * * misrepresentation."

STATUTES INVOLVED

1. Section 203 of the National Housing Act (Act of June 27, 1934, ch. 847, 48 Stat. 1248), as amended, 12 U.S.C. 1709 (1952 Ed., Supp. IV), provided in pertinent part as follows:[2]

> SECTION 203. (a) The Commissioner is authorized, upon application by the mortgagee, to insure as hereinafter provided any mortgage offered to him which is eligible for insurance as hereinafter provided, and, upon such terms as the Commissioner may prescribe, to make

[2] The present statute is the same except that the amounts and percentages in Section 203(b)(2), 12 U.S.C. 1709(b)(2) (1958 Ed., Supp. I), have been increased to permit the Commissioner to insure a greater proportion of the appraised value.

commitments for the insuring of such mortgages prior to the date of their execution or disbursement thereon * * *.

(b) To be eligible for insurance under this section a mortgage shall—

* * * * *

(2) Involve a principal obligation (including such initial service charges, appraisal, inspection, and other fees as the Commissioner shall approve) in an amount * * * not to exceed an amount equal to the sum of (i) 95 per centum * * * of $9,000 of the appraised value (as of the date the mortgage is accepted for insurance), and (ii) 75 per centum of such value in excess of $9,000 * * *.

* * * * *

2. Section 226 of the National Housing Act (Act of June 27, 1934, ch. 847), as added by the Housing Act of 1954 (Act of August 2, 1954, ch. 649, § 126, 68 Stat. 607), 12 U.S.C. 1715q, provides in pertinent part as follows:

SECTION 226. The Commissioner is hereby authorized and directed to require that, in connection with any property upon which there is located a dwelling designed principally for a single-family residence or a two-family residence and which is approved for mortgage insurance under section 203 * * * of this Act, the seller * * * shall agree to deliver, prior to the sale of the property, to the person purchasing such dwelling for his own occupancy, a written statement setting forth the amount of the appraised value of the property as determined by the Commissioner. * * *

3. The Federal Tort Claims Act provides in pertinent part as follows:

> 28 U.S.C. 1346(b)—
>
> Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for injury or loss of property * * * caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
>
> 28 U.S.C. 2680(h)—
>
> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> * * * * * *
>
> (h) Any claim arising out of * * * misrepresentation * * *.

STATEMENT

1. By Section 203(a) of the National Housing Act, *supra*, pp. 2–3, the Federal Housing Commissioner is authorized to insure mortgages upon residential property in an amount depending upon the appraised value of the property.

An application for insurance may be made only by a financial institution approved as a mortgagee by the Commissioner.[2] Applications are commonly made in

[2] Section 203(a), 12 U.S.C. 1709(a); 11 F.R. 177A–890, as redesignated, 13 F.R. 6443, 8260, 24 C.F.R. 200.4(a) (1949 Ed.)

advance of execution of the mortgage[4] in order that a prospective seller may have his house approved for mortgage insurance although the buyer is unknown. This is accomplished by causing an approved lender to file with FHA an application for a "conditional commitment" (R. 48). On receipt of such an application, the FHA technical staff appraises the property (1) to determine whether it meets certain standards of eligibility and (2) to fix a valuation for insurance purposes.[5] If the property is found eligible, the Commissioner agrees (in a conditional commitment) to insure a mortgage in an amount computed on the basis of the appraised value of the property, on the condition that the mortgagor is found financially able to carry the mortgage.[6]

By Section 226 of the National Housing Act, *supra*, p. 3, the Commissioner is directed to require that the seller of a single-family residence approved for insurance under Section 203 "shall agree to deliver, prior to the sale of the property, to the person purchasing such dwelling for his own occupancy, a written statement setting forth the amount of the appraised value of the property as determined by the Commissioner." Accordingly, the Commissioner's regulations require an application for mortgage in-

[4] See 19 F.R. 5045, 24 C.F.R. 221.9 (1958 Supp.). All C.F.R. citations in this petition are to regulations in force at the time the transaction here in question occurred.

[5] 24 C.F.R. (1949 Ed.) 200.4(b); 24 C.F.R. (1958 Supp.) 221.38.

[6] R. 48; 11 F.R. 177A-890, as redesignated, 13 F.R. 6443, 8260, 24 C.F.R. 200.4(b)(2)(i) (1949 Ed.); 19 F.R. 5045, 24 C.F.R. 221.12 (1958 Supp.).

surance to be "accompanied by an agreement * * * executed by the seller" whereby he agrees that prior to any sale of the dwelling he "will deliver to the purchaser * * * a written statement * * * setting forth the amount of the appraised value of the property as determined by the Commissioner."[1]

Upon issuing a conditional commitment to a proposed mortgagee, the Commissioner also issues a separate document entitled "Statement of FHA Appraisal" (R. 54). This statement must be furnished the purchaser before he enters into the contract to purchase, or, if it is not made available to the seller by that time, the contract must contain language to the effect that the purchaser will not be obligated to complete the purchase unless the seller has furnished such a statement setting forth an appraised value of not less than a designated amount (R. 56–57).

2. In early 1957, the owners of a single-family house and lot located in Alexandria, Virginia, in anticipation of selling the property, caused an approved lender to apply to the Federal Housing Commissioner for a conditional commitment to insure a mortgage (R. 53–54). Pursuant to this application, an FHA appraiser inspected the premises some time prior to March 14, 1957 (R. 30). An underwriting report was made, and the property was found to be eligible for mortgage insurance (R. 30). The Commissioner thereupon issued to the applying lender a conditional commitment based on an appraised value of $22,750 (R. 30–31, 33, 53–54).

[1] 19 F.R. 5045, 24 C.F.R. 221.14 (1958 Supp.).

The respondents became interested in the house after inspecting it on March 14, 1957 (Tr. 30),[8] and on April 9, 1957, entered into a contract for the purchase of the property at a price of $24,000 (R. 29, 59). Agreement was reached after preliminary negotiations, during the course of which the respondents were advised that FHA had appraised the property for insurance purposes at $22,750 (R. 37). The contract was conditioned upon the respondents obtaining a loan, secured by an FHA-insured mortgage, in the amount of $18,800.[9] The contract also provided that the sellers would deliver to the respondents, prior to the sale of the property, a written statement setting forth the appraised value of the property as determined by the Federal Housing Commissioner (R. 29, 33).

On July 2, 1957, the settlement date, the respondents took title to the property and signed the written "Statement of FHA Appraisal" which they had been furnished (R. 38, 56–57). This document stated that the Commissioner "has appraised the property identified * * * and for mortgage insurance purposes has placed an FHA-appraised value of $22,750 on such property as of the date of this statement. (*The FHA appraised value does not establish sales price.*)" [Emphasis in original.] (R. 56).

[8] "Tr." refers to the transcript of proceedings in the district court

[9] This was the maximum amount insurable, as Section 203(b)(2), *supra*, p. 3, of the National Housing Act established a maximum insurable amount of $18,862.50 (95% of $9,000, plus 75% of $13,750) for an appraised value of $22,750, and the Commissioner by regulation required mortgages to be in multiples of $100. 19 F.R. 5045, 24 C.F.R. 221.17(a) (1958 Supp.).

The respondents moved into the house on July 10, 1957 (R. 39). Shortly thereafter, the walls and ceiling of the house developed substantial cracks (R. 39–40). Subsequent inspection disclosed that the foundation was settling in an unusual manner. By drilling through the basement floor, FHA officials learned that the subsoil was of a type of clay which, when exposed to water, quickly disintegrates. It was determined that the unusual settling was caused by accumulation of water in this subsoil, due to poor drainage conditions around the house.

3. On June 17, 1958, the respondents brought this action under the Federal Tort Claims Act in the United States District Court for the Eastern District of Virginia to recover the difference between the current market value of their house and the purchase price of $24,000 (R. 29–32). After a trial, the district court found that the respondents "in good faith relied upon the Commissioner's appraisal in consummating their contract of purchase," and that "reasonable care by a qualified appraiser would have warned them" of the serious structural defects which had been "preponderantly proved" (R. 59). The court held (R. 59) the Government liable in the amount of $8,000, the difference between the fair market value of the property at the time of settlement ($16,000) and the purchase price ($24,000).

The Court of Appeals for the Fourth Circuit affirmed. The court accepted the Government's contention that the exception to the Federal Tort Claims Act for "claim[s] arising out of * * * misrepresentation" in 28 U.S.C. 2680(h) (*supra*, p. 4) covers

negligent as well as willful misrepresentation (App., *infra*, p. 24). The court held, however, that under the National Housing Act the Government owed a specific duty of care to the respondents and that, although "there was an element of misrepresentation of fact in the government's conduct" which "might form the basis of an action for misrepresentation under general common-law principles" (App., *infra*, pp. 30–31), the misrepresentation exception in 28 U.S.C. 2680(h) did not bar liability.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has held that a duty of care is owed by the United States to every purchaser of a home appraised by the FHA and secured by an FHA-insured mortgage and has also held that this duty, springing from the National Housing Act, is actionable under the Federal Tort Claims Act despite the express exception in 28 U.S.C. 2680(h) applicable to tort "claim[s] arising out of * * * misrepresentation." We believe that this decision is in conflict with decisions of Courts of Appeals in four other circuits, and, both in its specific application to liability under the National Housing Act and its broader application to other situations where misrepresentations by federal officials are involved, the issue is of very great importance in fixing the tort liability of the United States.[10]

[10] The court below in its opinion does not refer to Virginia law but seems to have regarded federal law, in the form of the National Housing Act, as the sole source of any duty of care toward the buyer owed by the Federal Housing Commissioner. If, as the United States contended, a private appraiser would

1. The Second, Eighth, Ninth, and Tenth Circuits have all held that, in situations similar to that here involved, where because of alleged antecedent negligence the Government misstates certain facts causing a person who has relied on those facts to suffer loss, any claim which that person may have is one "arising out of * * * misrepresentation" and, therefore, not actionable by reason of 28 U.S.C. 2680(h).[11]

The Court of Appeals for the Fourth Circuit would distinguish this case from the decisions of other circuits on the ground that here the misrepresentation was preceded by a breach by FHA of a specific duty owed to the respondents. That duty, in the court's view, was to take care not to appraise property at an inflated value. The distinction is without substance. Even if there were such a duty (see, *infra*, pp. 14–17), the fact remains that, absent the misrepresentation of the property value, the respondents would have gone unharmed. Other courts of appeals, on the other hand, in construing the misrepresentation exception of the Torts Claims Act have deemed the

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have owed no similar duty under Virginia law, then the fact that the National Housing Act imposed a unique duty upon the United States could not properly serve to bring the case within the Federal Tort Claims Act, which imposes liability upon the United States only in circumstances where a private person would be liable. 28 U.S.C. 1346(b), 2676.

[11] *Jones* v. *United States*, 207 F. 2d 563 (C.A. 2), certiorari denied, 347 U.S. 921; *National Mfg. Co.* v. *United States*, 210 F. 2d 263, 275–276 (C.A. 8), certiorari denied, 347 U.S. 967; *Clark* v. *United States*, 218 F. 2d 446, 452 (C.A. 9); *Miller Harness Co.* v. *United States*, 241 F. 2d 781 (C.A. 2); *Anglo-American and Overseas Corp.* v. *United States*, 242 F. 2d 236 (C.A. 2); *Hall* v. *United States*, 274 F. 2d 69 (C.A. 10).

controlling factor to be precisely whether the misrepresentation was essential to the complainant's injury.

Even if the distinction found by the court below were valid, a conflict with *Hall* v. *United States*, 274 F. 2d 69 (C.A. 10), is not avoided. There the Tenth Circuit, on the assumed facts that a Government agent negligently tested the plaintiff's healthy cattle for brucellosis and caused the plaintiff's loss by misrepresenting to him that his cattle were diseased, held the plaintiff's claim to be one "arising out of * * * misrepresentation" and within the 28 U.S.C. 2680(h) exception. Implicit in the decision was the assumption by the court that there had been a breach of a duty of care antecedent to the representation itself. Although the Tenth Circuit did not say whether this duty was owed to the public at large or to the owner of the cattle, it is obvious that the primary interest in not having healthy cattle represented as diseased would be the interest of the owner of the cattle who relies upon the representation of the Government agent.

Likewise, the holding of the Eighth Circuit in *National Mfg. Co.* v. *United States*, 210 F. 2d 263 (C.A. 8), certiorari denied, 347 U.S. 967, cannot be distinguished on the rationale adopted by the court below. Although the Eighth Circuit in *National Mfg.*, as one ground for its decision, held that the Government owed no duty to anyone to take care to ascertain flood conditions correctly, the court's alternative discussion of the applicability of the misrepresentation exception to the Federal Tort Claims Act in 28 U.S.C. 2680(h) clearly was premised *arguendo* on an assump-

tion that a duty was owing. Yet such a duty could only run to the class of persons likely to be affected by the flood, a class which included the plaintiff in that action, just as at the time of the appraisal the respondents in this case could only have been in contemplation by the appraiser as members of a general class of potential mortgagors.[12]

2. The proposition that the respondents' claim is one for "negligent misrepresentation"—and therefore excluded from the Tort Claims Act—is supported not only by the decisions from four other circuits which have specifically invoked the misrepresentation exception in 28 U.S.C. 2680(h), but also under general common law principles.

Responsibility for the tort of negligent misrepresentation may rest upon negligence in the "manner of expression," failure to use "reasonable care in ascertaining the facts" or "absence of the skill and competence required by a particular business or profession." Prosser, *Law of Torts*, pp. 541–545 (2d Ed., 1955); see also, *Restatement, Torts*, Sec. 552; 1 Harper & James, *Law of Torts*, § 7.6 (1956); Bohlen,

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[12] By the same token, *Clark* v. *United States*, 218 F. 2d 446, 452 (C.A. 9), a case quite similar to *National Mfg.*, cannot be distinguished on the basis of the Fourth Circuit's "specific duty" analysis. It is important to stress that, where there is no duty owed by the Government, there is, of course, no need to be concerned with the "misrepresentation" exception. The absence of a duty would itself exonerate the United States from any liability. Indeed, it is only where a duty is assumed that the "misrepresentation" exception or other specific exclusions in the Act can come into play. Under the opinion below, however, the presence of such a duty would preclude resort to the "misrepresentation" defense.

Misrepresentation as Deceit, Negligence, or Warranty, 42 Harv. L. Rev. 733. In other words, negligent misrepresentation is not confined to cases where information is communicated in a negligent manner, but extends as well to cases where, as here, a representation of fact or professional opinion is based upon an antecedent, negligent investigation.

There is no reason for supposing that Congress, when it used the word "misrepresentation" in 28 U.S.C. 2680(h), meant other than the tort generally described by that name. On the contrary, the presumption must be that Congress intended the word to have the scope it carries in normal legal usage. See *Stepp* v. *United States*, 207 F. 2d 909, 911 (C.A. 4), certiorari denied, 347 U.S. 933; *Dupree* v. *United States*, 264 F. 2d 140, 143–144 (C.A. 3), certiorari denied, 361 U.S. 823; *United States* v. *Hambleton*, 185 F. 2d 564, 566–567 (C.A. 9).[13]

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[13] The court below relied in part upon this Court's decision in *Indian Towing Co.* v. *United States*, 350 U.S. 61 and on *Somerset Seafood Co.* v. *United States*, 193 F. 2d 631 (C.A. 4). Appendix, *infra*, p. 27. Those cases differ significantly from the present one in that the government was directing private conduct so that the failure to give proper warning had a direct relationship to the damages suffered by the individuals who were, in practical effect, required to rely on the government for directions. Moreover, the exception for misrepresentations was not argued nor ruled upon by the courts involved, so that, so far as the issues here raised were present, they merely lurked in the record and the decisions cannot be considered precedents. *Webster* v. *Fall*, 266 U.S. 507, 511; see *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73, 87–88 (dissenting opinion).

3. For the reasons we have stated, the misrepresentation exception in 28 U.S.C. 2680(h), properly considered, is a bar to the respondents' suit even if an actionable duty is owed to a purchaser of FHA-appraised property. In point of fact, however, the Federal Housing Commissioner owes no actionable duty of care to a mortgagor. The statutory function of the FHA appraisal is to establish the maximum mortgage loan which FHA may insure on a particular piece of property. As pointed out in one of the legislative reports cited by the Fourth Circuit (App., *infra*, p. 29), "the FHA's appraisal system * * * [is] obviously essential to the proper underwriting of mortgage loan risks, and therefore operate[s] primarily for the protection of the Government and its insurance funds." H. Rept. 2271, 83d Cong., 2d Sess., p. 66.

It cannot be denied, however, that the appraisal incidentally affords certain benefits to the home buyer. As the FHA mortgage system is one of *mutual* insurance, each mortgagor has a tangible interest in the integrity of the FHA insurance fund. The appraisal, which ordinarily assures that each loan approved has the proper security behind it, is necessary to the preservation of this fund and thus protects those with a stake in it. And undoubtedly the FHA appraisal provides a measure of protection:

> * * * against the kind of mistakes in judgment which are likely to be made by a family not experienced in buying a home, or in home property values. * * * He will also have what probably only a small percentage of home buyers have ever had in the past: the benefit of

> knowing the appraised value set upon the property which he intends to buy or build, by a trained valuator acting in accordance with a procedure designed to reduce to a minimum, errors that might result from casual or hasty conclusions.[14]

Merely because the FHA appraisal provides such benefits to the home buyer, it does not follow that a negligent appraisal gives rise to an actionable claim. The committee reports, contrary to the court below (App., *infra*, p. 29), do not manifest a Congressional intent to impose upon the Government an actionable duty to the buyer. Although the Senate Report on the Housing Act of 1954 contains a section entitled "The Protection of the Consumer,"[15] that section merely expresses the direction of the committee that FHA should be more alive to the interests of the home owner than it had been in the past.[16] The

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[14] 1st Annual Report of the Federal Housing Administration, H. Doc. 88, 74th Cong., 1st Sess., at 17; see also, 90 Cong. Rec. A2985; 2d Annual Report of FHA, at 6; 4th Annual Report of FHA, at 15; 5th Annual Report of FHA, at 21; 6th Annual Report of FHA, at 9; 11th Annual Report of FHA, at 9; 12th Annual Report of FHA, at 8. And see also, Hearings before the Senate Committee on Banking and Currency on the National Housing Act, 73d Cong., 2d Sess., at 58, 127; Hearings before the House Committee on Banking and Currency on the National Housing Act, 73d Cong., 2d Sess., at 150; Hearings before the House Committee on Banking and Currency on Amendments to National Housing Act, 75th Cong., 2d Sess., at 84; Hearings before the House Committee on Banking and Currency on Amendment of the National Housing Act, 78th Cong., 1st Sess., at 8.

[15] S. Rept. 1472, 83d Cong., 2d Sess., 4–5.

[16] Cf. Hearings before the Senate Committee on Banking and Currency on the Housing Act of 1954, 83d Cong., 2d Sess., at 1806; 100 Cong. Rec. 12353.

Housing Act of 1954 was, of course, drafted at a time when certain abuses of the home improvement and rental-housing programs under the National Housing Act were being uncovered."[17] As the Senate committee report indicates, most of these abuses "were at the expense of the borrower."[18] It was a consequence of these disclosures that the committee emphasized the need for FHA to recognize its responsibility and afford increased protection to the borrower "under these programs," *i.e.*, the Title I programs,[19] which have nothing to do with mortgage insurance. Far from establishing a right to recover damages against the United States,[20] the Committee was concerned merely with protecting the borrower against "being

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[17] See S. Rept. 1472, 83d Cong., 2d Sess., 2; H. Rept. 2271, 83d Cong., 2d Sess., 63; 8th Annual Report, Housing and Home Finance Agency, 6–7, 92–93 (1954), 100 Cong. Rec. 12352; see generally, Hearings before the Senate Committee on Banking and Currency, 83d Cong., 2d Sess., on the Housing Act of 1954, pp. 1303–2029.

[18] S. Rept. 1472, 83d Cong., 2d Sess., 11.

[19] *Id.* at 11–12; see 100 Cong. Rec. 7610, 7611; Hearings before the Senate Committee on Banking and Currency on the Housing Act of 1954, 83d Cong., 2d Sess., 1305.

[20] "Senator BENNETT. I think if we are going to eliminate the possibilities of fraud, we have to do something to make sure that the customer, the borrower, the actual man who signs the note, realizes the limitations of the FHA insurance and is put definitely on notice that the insurance runs to the lender and it is not a protection or a guaranty to him of the workmanship.

"We have been talking about title I, today, mostly. Doesn't the same situation exist in the buildings that are built under title II?

"Mr. COLE [Administrator, Housing and Home Finance Agency]. I think so.

* * * * *

taken advantage of by salesmen and dealers and bankers and others." [21] There was no purpose or design to impose a legal duty upon the Government.

The court below made reference to the conference report on the Housing Act of 1954, H. Rept. 2271, 83d Cong., 2d Sess. As that report expressly declares the conference committee's understanding that "technically there is no legal relationship between the FHA and the individual mortgagor," (*id.* at p. 66), it is difficult to see how this report is an aid in finding that in the matter of property appraisals there is a legal duty, actionable in tort, running from the FHA to the mortgagor.

"* * * I agree with the Senator that the home buyer should understand that the Federal Government is not guaranteeing his home.

"Senator BENNETT. That is correct. Let's go back to this inspection service for a minute—this, of course, is outside of title I, because there is no inspection and there is no appraisal in title I.

"The idea of the inspection service under title II is to protect the Federal Government, which undertakes to insure the loan. The fact that the inspection is made, provides collateral benefits to the property owner. There is no question about that. But in the last analysis the property owner cannot say to the Federal Government, 'Well, your inspector inspected my house, and now look what's happened; therefore, you are responsible; therefore, you must come down here and fix it up.'

"Isn't that a correct statement of the limitation?

"Mr. COLE. I think so." [Hearings before the Senate Committee on Banking and Currency on the Housing Act of 1954, 83d Cong., 2d Sess., at 1402–1403.]

[21] Hearings before the Senate Committee on Banking and Currency on the Housing Act of 1954, 83d Cong., 2d Sess., at 1441; see, also, *id.* at 1454, 1654, 1656, 1700.

4. The magnitude of the possible liability of the Government as a result of the decision in this case is apparent from the fact that, in 1959 alone, 495,172 mortgages in an aggregate amount of $6,069,418,000, were insured by the FHA [22] following disclosure to the mortgagor of the FHA-appraised value of the property in accordance with Section 226 of the National Housing Act, *supra*, p. 3. The significance of the decision, moreover, cannot be confined to the property appraisal field. On principle, it opens the doors to liability, as a matter of federal law, wherever information compiled or acquired by a Government agency is, in accordance with a Congressional directive, made available to a particular group of persons and is relied upon by an individual to his detriment. Cf., *Jones* v. *United States*, 207 F. 2d 563 (C.A. 2), certiorari denied, 347 U.S. 921; *National Mfg. Co.* v. *United States*, 210 F. 2d 263, 275–276 (C.A. 8), certiorari denied, 347 U.S. 967; *Clark* v. *United States*, 218 F. 2d 446, 452 (C.A. 9); *Miller Harness Co.* v. *United States*, 241 F. 2d 781 (C.A. 2); *Anglo-American and Overseas Corp.* v. *United States*, 242 F. 2d 236 (C.A. 2); *Hall* v. *United States*, 274 F. 2d 69 (C.A. 10).

[22] Statistics are not maintained for the number of appraisals made in which insurance is not written, or for the excess of appraised value over the insured amount.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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NOVEMBER 1960.

APPENDIX

United States Court of Appeals for the Fourth Circuit

No. 8071

UNITED STATES OF AMERICA, APPELLANT
versus
STANLEY S. NEUSTADT AND ROSE-BARBARA Y. NEUSTADT, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA. ALBERT V. BRYAN, DISTRICT JUDGE

(Argued May 31, 1960. Decided August 19, 1960.)

Before SOPER and BOREMAN, Circuit Judges, and BARKSDALE, District Judge.

SOPER, Circuit Judge:

The question in this case is whether the purchaser of a single residence property covered by a mortgage under § 203(a) of the National Housing Act as amended, 12 U.S.C. § 1709(a), is entitled under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., to recover damages occasioned by the negligence of an agent of the Federal Housing Commissioner in mak-

ing an appraisal of the property under the provisions of the statute and the regulations issued pursuant thereto. See 12 U.S.C. § 1709(b)(2) and 24 C.F.R. § 200.4(b). The United States does not deny that the appraisal was faulty or that the purchasers were injured thereby but defends on the ground that the plaintiffs' claim arises out of misrepresentation which is excluded from the coverage of the Tort Claims Act by 28 U.S.C. § 2680(h).

The property is located in Alexandria, Virginia. The former owners, in anticipation of selling it, caused an approved lender to make application under 12 U.S.C. § 1709(a) of the Act for a conditional commitment to insure the mortgage and pursuant thereto the property was inspected by an FHA appraiser, who reported that the property was eligible for mortgage at the appraised value of $22,750. The plaintiffs as prospective purchasers were apprised of this fact. Thereupon a contract of sale was executed conditioned upon the purchasers obtaining a loan secured by an FHA mortgage in the sum of $18,800. Therein the sellers agreed to furnish the plaintiffs a written statement of the appraised value as so determined, and this was done upon the settlement date when the purchasers took title to the property.

The purchasers took possession of the house and several days later substantial cracks appeared in the interior walls and ceilings in all of the rooms, as well as in the cinder blocks in the basement walls. It was then found by FHA officials that cracks were appearing in the exterior walls, and that the one-story sun porch was separating from the east wall, and that the foundations were settling in an unusual manner. These conditions were found to have been caused by the character of the subsoil, which contained a type of clay that quickly disintegrates when

exposed to water; and it was ascertained that the underpinning of the foundations would require the expenditure of several thousand dollars.

The pending case was then brought and tried before the District Judge without a jury, who rendered a verdict in favor of the plaintiffs for $8000. The judge called attention to the amendment to the statute by the act of Congress of August 2, 1954, codified in 28 U.S.C. § 1715(q), whereby the seller of a dwelling approved for mortgage insurance under the statute is required to agree to deliver to the purchaser prior to the sale a written statement setting forth the amount of the appraised value of the property as determined by the Commissioner. The Judge held that the statute as amended imposes upon the United States the duty to appraise the property with ordinary care and diligence as a gauge of the fairness of the price to be paid by the purchaser and that neglect of this duty makes the United States liable to the purchaser. He was of the opinion that the appraisal involves not merely a representation on the part of the United States but the performance of a positive act by the government as a direct and immediate service to the purchasers. He found that in this case the plaintiffs, in good faith, relied upon the appraisal in consummating the purchase and, since serious structural defects in the house subsequently appeared which reasonable care by a qualified appraiser would have discovered, the negligence of the government to perform its statutory duty entitled the plaintiffs to recover the direct loss of $8000 resulting therefrom. Accordingly, a judgment for this amount was rendered against the United States.

The United States on this appeal relies upon the exclusionary section of the Tort Claims Act, which declares in 28 U.S.C. § 2680(h) that the provisions

of the statute shall not apply, inter alia, to any claim rising out of misrepresentation or deceit. It has been uniformly held that "misrepresentation" in this context, since it appears in the act in juxtaposition to "deceit", means negligent as well as wilful misrepresentation.[1] We are in accord with this view especially as it is reasonable to suppose that Congress intended to exempt the Government from liability for misinformation carelessly given by its agents to the public in the wide field of its manifold activities.[2] The Government therefore contends that it has no liability in the pending case, and in support of its position cites a number of cases in the federal courts, analyzed in footnote,[3] in which, under varying cir-

[1] Jones v. United States, 2 Cir., 207 F. 2d 563, cert. den., 347 U.S. 921; National Mfg. Co. v. United States, 8 Cir., 210 F. 2d 263, 275–276, cert. den., 347 U.S. 967; Clark v. United States, 9 Cir., 218 F. 2d 446, 452; Miller Harness Co. v. United States, 2 Cir., 241 F. 2d 781; Anglo-American & Overseas Corp. v. United States, 2 Cir., 242 F. 2d 236; Hall v. United States, 10 Cir., 274 F. 2d 69.

[2] In National Mfg. Co. v. United States, 8 Cir., 210 F. 2d 263, 276, the court said that the intent of the section is to except from the Act cases where mere "talk" or mere failure "to talk" on the part of a government employee is asserted as the proximate cause of damage sought to be recovered from the United States.

[3] In Anglo-American & Overseas Corp. v. United States, S.D. N.Y., 144 F. Supp. 635, affirmed 2 Cir., 242 F. 2d 236, a merchant purchased certain lots of imported tomato paste, relying upon the fact that it had been admitted into the United States after examination by agents of the United States pursuant to the Pure Food, Drug and Cosmetics Act. Later the merchant endeavored to sell the goods to the United States but they were rejected and condemned because they were found to be adulterated. It was held that the plaintiff could not recover because the duty imposed upon the United States under the statute was owed to the consumers and not to the dealer and, also, because the plaintiff's injury grew out of misrepresentation within the exception of the Tort Claims Act which was applicable, although the misrepresentation flowed from negligence in testing the goods.

cumstances, it has been exonerated from liability for damages caused by negligent misrepresentation of its agents. We can discern no clear line running through these cases which serves as a guide to the solution of the present controversy. In most of them liability could be based only upon misrepresentation by agents of the government since the actions complained of were carried on for the benefit of the public at large and not in the performance of a specific duty owed to the injured party, *Clark* v. *United States,* 9 Cir., 218 F. 2d 446; *Anglo-American & Overseas Corp.* v.

In Hall v. United States, 10 Cir., 274 F. 2d 69, the plaintiff, who was engaged in the cattle business in New Mexico, complained that he was injured when agents of the United States Department of Agriculture engaged in testing livestock for disease informed him that his cattle were diseased, causing him to sell them for less than their market value, whereas in fact there were no diseased cattle in the herd. It was held that the plaintiff could not recover because the loss was caused, not by the faulty testing of the herd, but by the misrepresentations of the government agents. Whether the duty to inspect was owed to the general public or to the plaintiff was not considered.

In Jones v. United States, 2 Cir., 207 F. 2d 563, cert. den. 347 U.S. 921, the plaintiffs sued for loss incurred when they sold their stock in an oil company for less than it was worth after they had asked the United States Geological Survey for information as to the ultimate recovery of oil to be expected from the company's lands and were told, as the result of a negligent estimate by an agent of the United States, that the expected recovery was far less than it turned out to be. It was held that the suit was based on misrepresentation, for which recovery was barred under the statute. Whether the government owed any duty to the plaintiffs was not discussed, but it was pointed out in the opinion of the District Judge, 120 F. Supp. 894, that the members of the geological survey are forbidden by the statute, 43 U.S.C. § 31, to execute surveys or examinations for private parties.

In Clark v. United States, 9 Cir., 218 F. 2d 446, it was held that the United States was not liable for damages to persons and property caused by flood in the Columbia River, since the evidence showed no negligence on the part of the United States either

United States, 2 Cir. 242 F. 2d 236; or the statute or contract governing the activity expressly exempted the government from liability for the acts of its agent, *Jones* v. *United States,* 2 Cir., 207 F. 2d 563, cert, den. 347 U.S. 921; *National Mfg. Co.* v. *United States,* 8 Cir., 210 F. 2d 263.

On the other hand, it has been held that if the government assumes a duty and negligently performs it, a party injured thereby may recover damages from

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in its precautions to prevent the flooding of lands or in the issuance of a bulletin to the public to the effect that the flood situation was not dangerous. The court added that even if the flood should have been foreseen and the bulletin was negligently issued, the government was not liable since the misrepresentation therein involved fell within the exception of the Tort Claims Act.

Again, in National Mfg. Co. v. United States, 8 Cir., 210 F. 2d 263, cert. den. 347 U.S. 967, the liability of the United States for dissemination by its agents of erroneous flood and weather reports was before the courts. It was held that the government was exonerated from liability for damages from flood waters by the express provision set out in the flood control act and that this provision was broad enough to bar recovery for damages caused by the negligence of government agents in circulating flood and weather reports; and it was also held that negligent conduct in the dissemination of erroneous reports was within the misrepresentation exception of the Tort Claims Act.

In Miller Harness Co. v. United States, 2 Cir., 241 F. 2d 781, the plaintiff purchased from the United States certain surplus property described as saddle parts in the invitation to bidders wherein bidders were cautioned to inspect the property, and it was expressly stated that the government made no guarantee as to quantity, kind, character or description. The plaintiff being uncertain as to the character of the saddle parts, telephoned the custodian of the government depot and was told that stirrup irons and stirrup leathers were included in the item. Accordingly, the plaintiff bought the goods; but when they were delivered no stirrup parts or stirrup leathers were included and accordingly he brought suit for their reasonable value. Judgment went against him on the ground that his claim was based merely on misrepresentation.

the United States even though the careless performance of the duty may have been accompanied by some misrepresentation of fact. Thus in *Otness* v. *United States,* D.C., Alaska, 178 F. Supp. 647, a shipowner sued to recover for the loss of his vessel due to collision with a submerged channel light which the Coast Guard undertook to locate but negligently failed to find, whereupon it issued an erroneous bulletin that no part of the light remained above the bottom of the sea. It was held that although the bulletin contained a misrepresentation of facts, this did not bring the case within the exemption of the Tort Claims Act or absolve the United States from liability for the negligent performance of a duty which it had voluntarily assumed. In like manner, the United States was held liable under the Federal Tort Claims Act for the negligent operation of a lighthouse in *Indian Towing Co.* v. *United States,* 350 U.S. 61, and for the negligent marking of a wreck in *Somerset Seafood Co.* v. *United States,* 4 Cir., 193 F. 2d 631. In each case liability was based upon the negligent performance of a duty assumed by or resting upon the government. There was no discussion in either case of the statutory exemption of the United States for liability for misrepresentation but, as pointed out by the District Judge in the court below, misrepresentation was necessarily involved in the negligent marking of the wreck in one case and in the absence of notice of peril to the mariner in the other.

The record in the instant case discloses that the government owed a specific duty to the plaintiffs as purchasers of the property and that they suffered substantial loss from the careless manner in which the duty was performed. The scheme of the National Housing Act, 12 U.S.C. § 1709(a), under which the purchase was made endows the Federal Housing Commissioner with power to insure a mortgage on a

single family residence property if the mortgage complies with certain statutory requirements and involves a principal obligation not in excess of specified fractions of the appraised value of the property, which are placed very high in order to aid a prospective buyer with limited capital to acquire a residence. Application for the insurance must be made by an approved financial institution and frequently is made in advance of the execution of the mortgage. On receipt of the application an appraisal of the property is made to determine whether it meets the standards prescribed by the Commissioner and to fix a valuation for insurance purposes. If the property is approved, a conditional commitment is made to the applicant wherein the Commissioner agrees to insure the property in an amount computed upon its appraised value provided it is found that the purchaser is financially able to carry the mortgage. Obviously the appraisal of the property is an important part of the process. To accomplish this the appraiser inspects the property to ascertain its condition and eligibility and, if it is found eligible, makes an appraisal based on its long-time economic value.

This procedure was designed to effectuate the purpose of the Act, to encourage the construction of housing by giving aid to prospective purchasers, and at the same time to protect the government from a loss that would be incurred by insuring undesirable property. In 1954, the purpose of Congress to protect the purchaser was emphasized and further advanced by the addition to the statute of the amendment set out in 28 U.S.C. § 1715(q) referred to above. This Act directed the Commissioner to require the seller of residential property, covered by an approved mortgage under the statute, to deliver to the purchaser a written statement setting forth the amount of the

appraised value as determined by the Housing Commissioner. The purpose of the new act to inform the purchaser of the value placed upon the property by government appraisal for his own guidance is clear upon the face of the enactment. If there were any doubt about it, it is made clear by the legislative history.

The Senate report upon the National Housing Act of 1954 contains a section entitled "The Protection of the Consumer" in which it was indicated that there was need for a change in the philosophy of the Federal Housing Administration in the administration of the statute, so that the agency, while keeping in mind the objectives of the Act to maintain a high limit of housing production and to protect the insurance fund and the mortgagee from loss, would recognize its responsibility to protect the public interest in general and the rights of homeowners in particular, and at all times to regard it as a primary responsibility to act in the interest of the individual home purchaser and protect him to the extent feasible. See 2 U.S. Code Congressional and Administrative News, p. 2726. The conference report on the measure emphasizes the same purpose. It pointed out that, notwithstanding the fact that there is no technical relationship between the FHA and the individual, it was the intent of Congress that the procedures of the administration should not be used exclusively for the protection of the government and its fund, and attention was drawn to the specific provision of the amended act which requires that the purchaser be given a written statement setting forth the FHA's appraised value of the property so that the purchaser may be informed as to the amount that would be warranted in making the purchase. 2 U.S. Code Congressional and Administrative News, p. 2828.

Thus, it is abundantly clear that the government owed a specific duty to the plaintiffs in this case even though there was no contractual relationship between them. The situation is similar to that considered by Judge Cardozo in *Glanzer* v. *Sheppard*, 233 N.Y. 236, where it was held that a public weigher, who was employed by the seller of goods and overstated the weight of the merchandise, was liable in damages to the buyer who bought them on the faith of the weigher's certificate. It was pointed out in the opinion that the defendant was not held merely for careless words but for the careless performance of the act of weighing.

So in the pending case, the wrongful conduct complained of does not consist merely or chiefly in the communication to the plaintiffs whereby they were notified that the Housing Commissioner had appraised the property for mortgage purposes at $22,750, but primarily in the negligent appraisal itself whereby they were led to pay more for the property than it was worth. The government takes the narrow ground that the purchasers' loss was not occasioned by the negligent appraisal but by the misrepresentation in the government's report of the appraisal. The communication itself however was not, strictly speaking, a misrepresentation of fact, for it correctly reported that the Commissioner had appraised the property and placed a valuation upon it of $22,750, both of which statements were true. It cannot be denied, however, that there was an element of misrepresentation of fact in the government's conduct when the transaction is considered as a whole. The report sent to the purchasers purported to be and might fairly be accepted by them as an accurate appraisal of the value of the property carefully made so that in effect it amounted to a misstatement of fact. Hence

it might form the basis of an action for misrepresentation under general common-law principles, for it is generally held that one who supplies information for the guidance of others in their business is liable for harm to those who rely upon the information if there has been negligence in obtaining and communicating it, and the person harmed is one for whose guidance the information was supplied. Restatement of Torts, § 552; Prosser on Torts, p. 543.

It does not necessarily follow, however, that the case falls within the exemption of the Tort Claims Act, since it involves not only misrepresentation but also negligent performance of a definite duty owed to the plaintiffs. The real question is whether it was the intent of Congress to absolve the government from liability in every case in which misrepresentation plays merely a part. Misrepresentation, as Prosser shows, runs all through the law of torts and there are many types of wrongful conduct in which there are elements of misrepresentation that are usually grouped under categories of their own. Thus, as the author says (p. 520):

> * * * A great many of the common and familiar forms of negligent conduct, resulting in invasions of tangible interests of person or property, are in their essence nothing more than misrepresentation, from a misleading signal by a driver of an automobile about to make a turn, or an assurance that a danger does not exist, to false statements or non-disclosure of a latent defect by one who is under a duty to give warning. In addition, misrepresentation may play an important part in the invasion of intangible interests, in such torts as defamation, malicious prosecution, or interference with contractual relations. In all such cases the particular form which the defendant's

> conduct has taken has become relatively unimportant, and misrepresentation has been merged to such an extent with other kinds of misconduct that neither the courts nor legal writers have found any occasion to regard it as a separate basis of liability.

In view of this situation we do not think that the government is necessarily absolved from liability in every case of wrongful conduct on its part which incidentally embraces misrepresentation. It is abhorrent to common sense to hold that the government can relieve itself from liability for neglect of duty owed to an individual merely by telling him falsely that the duty has been faithfully performed; and it cannot be supposed that Congress had any such idea in mind when it included "misrepresentation" among the exceptions to the statute. Quite clearly the gist of the offense in this case was the careless making of an excessive appraisal so that the home seeker, whom the Commissioner was obligated to protect, was deceived and suffered substantial loss. This was the gravamen of the offense to which the report of the Commissioner was merely incidental. Accordingly, the judgment of the District Court is affirmed.

Affirmed.

JUDGMENT

United States Court of Appeals for the Fourth Circuit

No. 8071.

UNITED STATES OF AMERICA, APPELLANT

vs.

STANLEY S. NEUSTADT AND ROSE-BARBARA Y. NEUSTADT, APPELLEES.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

MORRIS A. SOPER,
United States Circuit Judge,

HERBERT S. BOREMAN,
United States Circuit Judge,

A. D. BARKSDALE,
United States District Judge.

AUGUST 19, 1960.

U.S. GOVERNMENT PRINTING OFFICE: 1960

FILE COPY

No. 533

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

UNITED STATES OF AMERICA,
Petitioner,

v.

STANLEY S. NEUSTADT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

The Solicitor General advances four reasons for granting a writ of certiorari: (1) There is an alleged conflict with certain decisions of other Courts of Appeals; (2) The court below misinterpreted and so failed to apply the "misrepresentation" exception in the Tort Claims Act, 28 U.S.C. 2680(h); (3) The court below incorrectly held that there was an actionable duty of care owed by the Federal Housing Commissioner to the respondents; and (4) The possible liability of the government, under the decision below, while not ascertainable, could conceivably

be large. We shall discuss the first two of these contentions together since the alleged conflict rests in part upon the Solicitor General's incorrect interpretation of 28 U.S.C. 2680(h).

I. There Is No Conflict Between the Decision Below and Those of Other Courts of Appeals

In the twenty-two years since the Tort Claims Act was enacted there have been about half a dozen reported cases in which recovery was sought for an injury that could arguably be said to have been caused by reliance upon a misrepresentation by an employee of the United States, and the decision in each case was based upon a reasonably unique set of facts. For this reason, as the court below pointed out, these cases afford "no clear line . . . which serves as a guide to the solution of the present controversy," and far from being in conflict with the instant decision, they are readily reconcilable with it.

The Tort Claims Act, of course, permits recovery for injuries caused by the negligence of employees of the United States. As the court below noted (Pet. pp. 31-32), there are numerous and familiar instances in which negligent conduct, in a context that includes some form of inaccurate communication, results in injury for which recovery is allowed in an action for negligence rather than for misrepresentation. The Solicitor General appears to argue, however, that the "misrepresentation" exception to the Tort Claims Act must be interpreted to exclude recovery in every case where some communication can be found. It is on this basis that he contends that the decision below is in conflict with such cases as *Hall* v. *United States*, 274 F.2d 69 (C.A. 10) and *National Mfg. Co.* v. *United States*, 210 F.2d 263 (C.A. 8), *cert. den.* 347 U.S. 967, since in those cases incorrect representations had been made to

the plaintiffs and recovery was denied, while in this case recovery has been allowed.

There is no apparent basis for this sweeping interpretation of Section 2680(h), and it is hard to believe that the Congress intended to exclude recovery under the Tort Claims Act in the many situations in which negligence rather than misrepresentation has always been considered an appropriate form of action. No such intention can be found in the statutory language and even less can it be found in the legislative history.[1] The sounder analysis, followed by the court below, is to determine whether the gist of the offense is the negligent conduct or the misrepresentation. If it is the negligent conduct, and the communication is incidental, then recovery should be allowed. If, on the other hand, the misrepresentation is the fundamental element in the chain of events leading to the injury, then perhaps the exception applies. Of necessity, therefore, each case turns upon its particular facts.

We agree, in short, "that Congress intended the word [misrepresentation in 28 U.S.C. 2680(h)] to have the scope it carries in normal legal usage." (Pet., p. 13). The court below, applying this principle, properly found respondents' action one for negligence, which made the "misrepresentation" exception inapplicable.

The issue of whether a plaintiff's claim is based fundamentally upon negligent conduct or upon misrepresentation is frequently an interesting and difficult one and it affords a further proof of the continued vitality of Maitland's famous

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[1] If anything, the legislative history indicates an intention to provide an exception for only willful and not for negligent misrepresentation. See H. Rep. 2245, 77th Cong., 2d Sess. at p. 10 ("these exceptions cover . . . deliberate torts such as assault and battery and others."); S. Rep. 1196, 77th Cong., 2d Sess., p. 7; H. Rep. 1287, 79th Cong., 1st Sess., p. 6; Hearings Before the House Judiciary Committee, 76th Cong., 2d Sess., 28, 33, 34, 45.

dictum about the forms of action. But this question is one that hardly deserves the attention of this Court. In this case, moreover, the question was correctly decided by the court below. As we show later, there was an antecedent duty of care owed by the Federal Housing Commissioner to the respondents that was not adequately performed long before there was any communication to the respondents at all. No such showing was made in the cases relied upon by the government to establish a conflict.[2]

The Solicitor General is, moreover, inaccurate when he says that "absent the misrepresentation of the property value, the respondents would have gone unharmed." (Pet. p. 10). Their injury did not result from their reliance upon the appraisal report but from the fact that the mortgage insurance was available to them. By the terms of their purchase contract they were obligated to accept a deed to the property only if FHA insurance was issued. They had so conditioned their purchase contract because

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[2] As the Solicitor General says, in *Hall* v. *United States*, *supra*, the Court of Appeals for the 10th Circuit did not deal with the question whether the duty there was owed to the public at large rather than the owner of the cattle. It is not as obvious to us, however, as it is to the Solicitor General, that a statute that authorizes the imposition of severe restrictions upon the transportation of diseased cattle in interstate commerce was adopted primarily in the interest of the cattle owner rather than as a means of preventing the spread of the disease to other herds. See 9 C.F.R. Part 76; Cf. *Anglo-American and Overseas Corp.* v. *United States*, 141 F. Supp. 635 (S.D.N.Y.), aff'd. 242 F. 2d 236 (C.A. 2).

The government also argues (Pet. fn. 12) that under the opinion below the existence of a duty of care precludes resort to the "misrepresentation" defense and so effectively reads this exception out of the statute. This quite mistakes the holding of the Court of Appeals. The "misrepresentation" exception would, under that Court's opinion, remain the only basis for denying liability which would otherwise be imposed where the duty of care arises in connection with or as a result of the making of the representation. It is only where there is a pre-existing duty of care related to the activity of the government employee that the exception is inapplicable and this is because the cause of action is based fundamentally upon the wrongful conduct.

of their knowledge that insurance would not be available unless a careful inspection of the premises by an FHA appraiser failed to reveal the existence of any serious structural defect (R. 39-40). Thus it was the admittedly negligent inspection that was the direct cause of their injury. If, for some reason, the government had failed to carry out its statutory obligation to furnish respondents with the statement of appraised value, there would have been no break in the chain of causation between the wrongful conduct and the injury. The communication, upon which the Solicitor General bases his contention that respondents' cause of action was for misrepresentation and not for negligence, was in fact a trivial and non-essential element in the total activity that gave rise to the government's liability.

II. The Decision of the Court of Appeals That the FHA Owed the Respondents an Actionable Duty of Due Care Does Not Warrant Review by This Court

Once it is recognized that the respondents' action sounds in negligence, the question of whether the conceded negligence of the United States is actionable involves only the routine application of well-settled principles of tort law. Whether there is a duty to carry out a particular activity only with due care, how the class of persons to whom that duty is owed is to be determined, whether injury is reasonably foreseeable if the activity in question is negligently carried out—these are questions that are answered daily by our common-law courts. Cf., for example, the two landmark opinions of Judge Cardozo in *Glanzer* v. *Shepard*, 233 N.Y. 236, 135 N.E. 275, and *Ultramares Corporation* v. *Touche*, 255 N.Y. 170, 174 N.E. 441. These questions were answered in respondents' favor by the court below and this Court does not, under its rules, undertake to re-

view decisions of this nature on the basis of an assertion that these issues were incorrectly decided.

In point of fact the decision of the court below was eminently sound. The Congress, in connection with the adoption of Section 226 of the National Housing Act,[3] made it abundantly plain that the functions of the Federal Housing Administration, under its mortgage insurance programs, were to be conducted not only for the government's own benefit but also for the benefit of the prospective home buyer. The relevant legislative history is discussed in the opinion of the court below. (Pet. p. 29).

The Solicitor General suggests that when the House Committee on Banking and Currency stated that "it is the intent of Congress that the HHFA and its constituent agencies in their administration of the programs which they are authorized to carry out shall at all times regard as a primary responsibility their duty to act in the interest of the individual home purchaser and in so doing to protect his interest to the extent feasible,"[4] it was referring only to the Title I and not to the Title II programs of the FHA. There is not a word in the report itself, however, that indicates that this is the case. On the contrary the report as a whole suggests the contrary—that this language was meant to apply to all of the FHA programs.[5] Furthermore, the government does not suggest, as it could not, that the conference report referred to by the court below was not in terms directed to the Title II mortgage insurance program. The relevant portions of this conference report are reprinted in Appendix A to this brief. They demonstrate unambiguously the understanding of the

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[3] It is this section that requires the statement of appraised value to be furnished the buyer of a home financed through an FHA insured mortgage.

[4] S. Rep. 1472, 83d Cong., 2d Sess., 5.

[5] *Id.*, pp. 19, 69.

Congress that the inspection program of the FHA was designed in principal part as a protection for the individual home buyer.[6]

The Solicitor General argues that because the conference report recognized that "there is no legal relationship between the FHA and the individual mortgagor," it cannot aid in the resolution of the issue of whether there was an actionable duty of care running from the FHA to the mortgagor. But there is, of course, no legal relationship (until the accident occurs) between a pedestrian and the driver of the mail truck who runs him down, or, to take another example, between a property owner and the employees of the Forest Service who negligently fail to control a forest fire.[7] Just as the public weigher in *Glanzer* v. *Shepard, supra,* was held liable because he knew that his report was prepared for the benefit of the plaintiff, so here the Housing Commissioner is liable because he knew that his inspection was carried out pursuant to a statute designed specifically to protect the individual home buyer.

Finally, the Solicitor General mistakes, in our view, the magnitude of the possible liability of the government that might result from a decision in this case. His concern

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[6] The Solicitor General advances the contention (Pet. fn. 10), not strongly pressed below, that there would be no liability here "if a private appraiser would have owed no similar duty under Virginia law," and therefore that the imposition of "a unique duty upon the United States" by the National Housing Act is irrelevant. But 28 U.S.C. 1346(b) and 2674 make the United States liable to the same extent as a private person "under like circumstances . . . " The real question, therefore, is whether a private appraiser in Virginia, performing his duties under a statute intended specifically to protect the individual home buyer would be held liable. Neither party below could find any Virginia cases bearing directly on this point and so the Court of Appeals was forced to rely upon well settled principles of the common law of torts. Cf. *Valz* v. *Goodykoontz,* 112 Va. 853, 72 S.E. 730.

[7] *Rayonier* v. *United States,* 352 U.S. 315.

might have been justified if the court below had found that the FHA was a guarantor of the structural soundness of houses financed by its insurance mortgages. But since recovery may be had only where the negligence of the FHA can be established, and since this can be done, except in the extraordinary case, only with the greatest difficulty, it is highly unlikely that this case will be followed by many others like it. The very fact that scores of billions of dollars of mortgage insurance have been issued since 1934 and that only now has the first case of this kind arisen seems overwhelmingly persuasive of the fact that the Solicitor General's fears are without foundation.

Conclusion

For the reasons given the petition for certiorari should be denied.

Respectfully submitted,

LAWRENCE J. LATTO,
Attorney for Respondents.

December, 1960.

APPENDIX A

Excerpt From Conference Report on Housing Act of 1954, H. Rep. No. 2271, 83d Cong., 2d Sess., pp. 66-67.

"Historically, the fundamental soundness of the whole concept of the FHA home mortgage insurance system has rested on the integrity of its appraisal system as a measurement of the long-term economic value of a given residential property to be underwritten with an insured mortgage loan. Basically, the F.H.A's appraisal system, as well as many of its other prinicipal procedures (such as its property location standards, its minimum construction requirements, and its inspection system), are obviously essential to the proper underwriting of mortgage loan risks, and therefore operate primarily for the protection of the Government and its insurance funds. Nevertheless, the Congress has consistently recognized—and intended—that, notwithstanding the fact that, technically there is no legal relationship between the FHA and the individual mortgagor, these FHA procedures also operate for the benefit and protection of the individual home buyer. However, there has apparently been a strong tendency on the part of the FHA to view these procedures as operating *exclusively* for the protection of the Government and its insurance funds. The committee of conference does not believe such a view to be consistent with the intent of the Congress in respect of the basic legislation relating to the FHA in the past, and, as to the future, desire to make it abundantly clear that such is not the case.

"In this connection, the committe of conference calls attention to two specific provisions included in the conference substitute which clearly indicate the intent of the Congress that the protections of the FHA system shall also inure to the benefit of the individual home buyers. • • • The other is the provision which requires that the seller or builder or such other person as may be designated by the FHA Commissioner shall agree to deliver, prior to the execution of a contract for the sale of the property,

to the purchaser a written statement setting forth the amount of the FHA's appraised value of the property.

"The committee of conference desires to point out the importance it attaches to the latter provision, especially at this particular time, in protecting the individual home buyers. Generally speaking, an appraisal of the long-term economic value of a particular residential property represents the informed judgment of a professional technician as to the dollar amount which a well-informed purchaser, acting without duress or compulsion, would be warranted in paying for such property for long-term use or investment. . . ."

(3186-4)

No. 533

In the Supreme Court of the United States

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v.

STANLEY S. NEUSTADT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Virginia (R. 9–11) is unreported. The opinion of the court of appeals (R. 57–66) is reported at 281 F. 2d 596.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1960 (R. 67). The petition for a writ of certiorari was filed on November 17, 1960, and was granted on December 19, 1960. 364 U.S. 926 (R. 68). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

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QUESTIONS PRESENTED

1. Whether an appraisal of private property by an appraiser of the Federal Housing Administration, made for purposes of insurance by the F.H.A. of a private mortgage, gives rise to an actionable duty of due care to one who later becomes a purchaser of the property.

2. Whether a claim by a purchaser of property, based upon a statement made to him of an F.H.A. appraisal inaccurately reflecting the value of the property, is excepted from the coverage of the Federal Tort Claims Act as a "claim arising out of * * * * misrepresentation."

STATUTES INVOLVED

1. Section 203 of the National Housing Act (Act of June 27, 1934, ch. 847, 48 Stat. 1248), as amended, 12 U.S.C. 1709 (1952 Ed., Supp. IV), provided in pertinent part as follows:[1]

> (a) The Commissioner is authorized, upon application by the mortgagee, to insure as hereinafter provided any mortgage offered to him which is eligible for insurance as hereinafter provided, and, upon such terms as the Commissioner may prescribe, to make commitments for the insuring of such mortgages prior to the date of their execution or disbursement thereon * * *.

[1] The present statute is the same except that the amounts and percentages in Section 203(b)(2), 12 U.S.C. 1709(b)(2) (1958 Ed., Supp. I), have been increased to permit the Commissioner to insure a greater proportion of the appraised value.

(b) To be eligible for insurance under this section a mortgage shall—

* * * * *

(2) Involve a principal obligation (including such initial service charges, appraisal, inspection, and other fees as the Commissioner shall approve) in an amount * * * not to exceed an amount equal to the sum of (i) 95 per centum * * * of $9,000 of the appraised value (as of the date the mortgage is accepted for insurance), and (ii) 75 per centum of such value in excess of $9,000 * * *.

* * * * *

2. Section 226 of the National Housing Act (Act of June 27, 1934, ch. 847), as added by the Housing Act of 1954 (Act of August 2, 1954, ch. 649, § 126, 68 Stat. 607), 12 U.S.C. 1715q, provides in pertinent part as follows:

The Commissioner is hereby authorized and directed to require that, in connection with any property upon which there is located a dwelling designed principally for a single-family residence or a two-family residence and which is approved for mortgage insurance under section 203 * * * of this Act, the seller or builder or such other person as may be designated by the Commissioner shall agree to deliver, prior to the sale of the property, to the person purchasing such dwelling for his own occupancy, a written statement setting forth the amount of the appraised value of the property as determined by the Commissioner. * * *

3. The Federal Tort Claims Act provides in pertinent part as follows:

> 28 U.S.C. 1346(b)—
>
> Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for injury or loss of property * * * caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
>
> 28 U.S.C. 2680(h)—
>
> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> * * * * * *
>
> (h) Any claim arising out of * * * misrepresentation * * *.

STATEMENT

1. *The statutory scheme.*—By Section 203(a) of the National Housing Act,[2] the Federal Housing Commissioner (the head of the Federal Housing Administration) is authorized to insure any mortgage "eligible for insurance as hereinafter provided" and "to make commitments for the insuring of such mortgages prior to the date of their execution * * *." To

[2] 48 Stat. 1248, as amended, 12 U.S.C. 1709 (1952 ed., Supp. IV), in pertinent part, *supra*, pp. 2–3.

be eligible, a mortgage, *inter alia*, must not "exceed an amount equal to" specified fractions of "the appraised value of the property." These maximum levels reflect high loan-to-value ratios, in accordance with the congressional purpose to facilitate financing for the prospective homebuyer with limited capital.[3]

An application for insurance may be made only by a financial institution approved as a mortgage by the Commissioner.[4] Applications are commonly made in advance of execution of the mortgage[5] in order that the prospective seller may have his house approved for mortgage insurance although the buyer is unknown. This is acomplished by causing an approved lender to file with F.H.A. an application for a "conditional commitment" (R. 38). On receipt of such an application, the F.H.A. technical staff appraises the property (1) to determine whether it meets the standards of eligibility and (2) to fix a valuation for insurance purposes.[6] If the property is found eligible, the Commissioner agrees (in a conditional commitment) to insure a mortgage in an amount computed on the basis of the appraised value of the

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[3] H. Rept. 1922, 73d Cong., 2d Sess., pp. 1-2; H. Rept. 1429, 83d Cong., 2d Sess., p. 2; see Report of the President's Advisory Committee on Government Housing Policies and Programs, p. 2 (1953).

[4] Section 203(a), 12 U.S.C. 1709(a); 11 F.R. 177A-890, as redesignated, 13 F.R. 6443, 8260, 24 C.F.R. 200.4(a) (1949 ed.). All C.F.R. citations in this brief are to regulations in force at the time the transaction here in question occurred.

[5] See 19 F.R. 5045, 24 C.F.R. 221.9 (1958 Supp.).

[6] 24 C.F.R. 200.4(b) (1949 ed.); 24 C.F.R. 221.38 (1958 Supp.).

property, on the condition that the mortgagor is found financially able to carry the mortgage.'

As part of FHA's underwriting investigation, an appraiser visits the premises' (R. 38). His duties include inspection of the home to determine its general condition, in light of the eligibility and security requirements of F.H.A. (R. 42).[8] If the property does not meet these requirements, he may report that certain repairs or improvements should be made preconditions to eligibility, or may recommend rejection of the application after determination that the objectionable defect cannot feasibly be corrected (R. 40–43). If no such defects are found, he makes an appraisal based on the "long-term economic value" of the property.[9]

By Section 226 of the National Housing Act,[10] the Commissioner is directed to require that the seller of a single-family residence approved for insurance under Section 203 "shall agree to deliver, prior to the sale of the property, to the person purchasing such dwelling for his own occupancy, a written statement setting forth the amount of the appraised value of the property as determined by the Commissioner." Accordingly, the Commissioner's regulations require an application for mortgage insurance to be "accom-

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[7] R. 38; 11 F.R. 177A–890, as redesignated, 13 F.R. 6443, 8260, 24 C.F.R. 200.4(b)(2)(i) (1949 ed.); 19 F.R. 5045, 24 C.F.R. 221.12 (1958 Supp.).

[8] See H. Rept. 2271, 83d Cong., 2d Sess., p. 66.

[9] *Id.* at 67.

[10] As added by Section 126, Housing Act of 1954, 68 Stat. 607, 12 U.S.C. 1715q, reprinted in pertinent part, *supra*, p. 3.

panied by an agreement * * * executed by the seller" whereby he agrees that prior to any sale of the dwelling he "will deliver to the purchaser * * * a written statement * * * setting forth the amount of the appraised value of the property as determined by the Commissioner." [11]

Upon issuing a conditional commitment to a proposed mortgagee, the Commissioner also issues a separate document entitled "Statement of FHA Appraisal" (R. 53–54). This is the statement which must be furnished the purchaser before he enters into the contract to purchase, or, if it is not made available to the seller by that time, the contract must contain language to the effect that the purchaser will not be obligated to complete the purchase unless the seller has furnished such a statement setting forth an appraised value of not less than a designated amount (R. 53, 54).

2. *The facts of this case.*—In early 1957, Mr. and Mrs. Elmer Almquist, the owners of a single-family house and lot located in Alexandria, Virginia, in anticipation of selling the property, caused an approved lender to apply to the Federal Housing Commissioner for a conditional commitment to insure a mortgage (R. 15, 44). Pursuant to this application, an F.H.A. appraiser inspected the premises some time prior to March 14, 1957 (R. 2, 5, 15). An underwriting report was made, and the property was found to be eligible for mortgage insurance (R. 2, 5). The Commissioner thereupon issued to the applying lender a conditional

[11] 19 F.R. 5045, 24 C.F.R. 221.14 (1958 Supp.).

commitment based on an appraised value of $22,750 (R. 2, 5, 53–54).

The respondents became interested in the house after inspecting it on March 14, 1957 (R. 14, 24), and on April 9, 1957, entered into a contract for the purchase of the property at a price of $24,000 (R. 1, 5). Agreement was reached after preliminary negotiations, during the course of which the respondents were advised that F.H.A. had appraised the property for insurance purposes at $22,750 (R. 16). The contract was conditioned upon the respondents obtaining a loan, secured by an F.H.A.-insured mortgage, in the amount of $18,800.[12] The contract also provided that the sellers would deliver to the respondents, prior to the sale of the property, a written statement setting forth the appraised value of the property as determined by the Federal Housing Commissioner (R. 1, 5, 53–54).

On July 2, 1957, the settlement date, the respondents took title to the property and signed the written "Statement of FHA Appraisal" which they had been furnished (R. 18, 53–54). This document stated that the Commissioner "has appraised the property identified * * * and for mortgage insurance purposes has placed an FHA-appraised value of $22,750 on such

[12] This was the maximum amount insurable. Section 203 (b) (2), *supra*, p. 3, of the National Housing Act established a maximum insurable amount of $18,862.50 (95% of $9,000 plus 75% of $13,750) for an appraised value of $22,750, and the Commissioner by regulation required mortgages to be in multiples of $100. 19 F.R. 5045, 24 C.F.R. 221.17(a) (1958 Supp.).

property as of the date of this statement. (*The FHA appraised value does not establish sales price.*)" (Emphasis in original.) (R. 53.)

When respondents first visited the property on March 14, 1957, soon after the appraisal, they noted "that all of the interior walls and ceilings had been recently painted"; Mrs. Neustadt "noticed no cracks whatsoever in the plaster or paint on the interior walls, nor did she notice any exterior cracks," and Mr. Neustadt "was impressed with the cleanliness and excellent condition of the interior walls."[13] The exterior walls were "covered with ivy, almost completely," and the grounds were landscaped (R. 24–25).

Respondents were again at the house on July 2, 1957, the day of the settlement (R. 18). On this visit, Mr. Neustadt testified, their prime purpose was "to see whether possibly any redecoration was necessary" (R. 18). To that end they "inspected the house quite carefully," finding "absolutely nothing which would indicate the necessity for any redecoration at all. The walls, the interior walls of the house had all been relatively recently painted. We'd been told that they had been painted just before we first saw the house in March. House was immaculately clean and the walls and the ceilings, as I say, looked fine to us" (R. 19).

[13] G. Ex. 1, p. 2. Mr. Neustadt also stated that he "had only a very hurried view of the basement, and I don't recall noticing, during that visit, any cracks in the basement wall." *Ibid.*

Mr. Neustadt further testified that, on July 2, 1957, "for the first time," he noticed "a crack on the inside wall of the basement * * * but it was a crack which had been filled in or pointed up, and as I say, the house seemed to be in very nice condition" (R. 19).

Respondents moved into the house eight days later, on July 10, 1957 (R. 19). Shortly thereafter, the walls and ceiling of the house developed substantial cracks (R. 19–20). Respondents called on two plastering contractors and two builders who, after inspection, could report only that something substantial appeared to be wrong, but they could not determine what (R. 20–21). One suggestion was that the condition could have been caused by the roots of a large tree nearby, another that it could be attributable to water under and around the house (R. 21). An F.H.A. inspector next visited the house, at Mr. Neustadt's request, spending at least an hour investigating the condition (R. 21). He returned with two other men to continue his investigation (R. 22–23). Finally, the investigator returned once more with still another F.H.A. employee to pursue the matter still further (R. 22). They were met at the house by the original builder (R. 22). In search of the difficulty, the three men first dug into the ground on the outside of the house (R. 22). Where this proved of no avail, they dug through the concrete basement floor to examine the nature of the subsoil (R. 22). It was only then that the cause of the unusual settling was discovered to be the subsoil, which consisted of a type

of clay that, when exposed to water, quickly disintegrates (R. 22, 29, P. Ex 11)."[4]

3. *The proceedings below.*—On June 17, 1958, the respondents brought this action under the Federal Tort Claims Act in the United States District Court for the Eastern District of Virginia to recover the difference between the current market value of their house and the purchase price of $24,000 (R. 1–3). After a trial, the district court found that the respondents "in good faith relied upon the Commissioner's appraisal in consummating their contract of purchase," and that "reasonable care by a qualified appraiser would have warned them" of the serious structural defects which had been "preponderantly proved" (R. 10). The court held (R. 10) the government liable in the amount of $8,000, the difference between the fair market value of the property at the time of settlement ($16,000) and the purchase price ($24,000).

The Court of Appeals for the Fourth Circuit affirmed. The court accepted the government's contention that the exception to the Federal Tort Claims Act for "claim[s] arising out of * * * misrepresen-

[4] A civil engineer retained by the respondents, in mid-August 1957, testified that he determined the cause in the following manner (R. 29):

"I had one of my men drill an auger hole through a hole in the basement floor near the northeast corner of the basement down into the soil below and I observed that the basement floor had been placed on a cinder fill, that that cinder fill had water in it. I further observed that the clay, that there was clay under the basement floor and that this clay when it was wet as it was became plastic and pliable."

tation" in 28 U.S.C. 2680(h) (*supra*, p. 4) covers negligent as well as wilful misrepresentation (R. 59). The court held, however, that under the National Housing Act the government owed a specific duty of care to the respondents and that, although "there was an element of misrepresentation * * * under general common-law principles" (R. 65), the misrepresentation exception in 28 U.S.C. 2680(h) did not bar liability.

SUMMARY OF ARGUMENT

The courts below have held that every person whose purchase of property since the enactment of the Housing Act of 1954 was aided by F.H.A.-insured financing has the right to rely on the appraised valuation of his property as made by the F.H.A. and, if that valuation proves to have been negligently in error, the purchaser (through a suit instituted under the Federal Tort Claims Act, 28 U.S.C. 1346(b)) may recover from the federal government the difference between the true worth of the property and the erroneous evaluation. This holding, we submit, is erroneous, both because the F.H.A. owes no duty of due care to the prospective purchaser, and also because the Tort Claims Act expressly excepts "Any claim arising out of * * * misrepresentation".

I

Neither the terms of the Housing Act, as originally enacted and as amended, nor its legislative history indicate a congressional purpose to guarantee the value of property purchased with federally-aided financing or to protect the purchaser against a care-

less appraisal. On the contrary, the primary objective of the F.H.A. appraisal system was to aid the government in its insurance of mortgage loans. The protection of the government was foremost. It was recognized from the beginning, of course, that the various F.H.A. procedures, including the appraisal system, would help prospective purchasers in their dealings with sellers, but the controlling end of the appraisal program has always been the maintenance of a sound system of government insurance of the lender-mortgagee against loss.

No change was made by the addition, in the Housing Act of 1954, of Section 226, which directs the F.H.A. to require the seller or builder to deliver to the purchaser a written statement reflecting the amount of the appraised value as determined by F.H.A. The legislative history of this provision shows that Congress intended no more than to make available to the prospective vendee the same information then available to the vendor, as an anti-inflationary device and as a part of an overall attempt to rectify what Congress felt to be a general inequality in the bargaining position of the two parties. This intent is underscored by the attention given during the consideration of the 1954 Act, as well as during the preceding hearings, to the concept of the F.H.A. housing program as insurance of repayment running to the lender-mortgagee, rather than as a guarantee of construction and value running to the purchaser.

II

If, however, it be assumed, *arguendo,* that there exists a duty arising out of the F.H.A. appraisal upon which the purchaser would, at common law, have a right to institute an action, he has no such right under the Federal Tort Claims Act, the only pertinent waiver of sovereign immunity to federal tort liability. For the gravamen of the purchaser's cause of action is that the value of the property was misrepresented to him by the government, and "claim[s] arising out of * * * misrepresentation" are excepted from the Federal Tort Claims Act (18 U.S.C. 2680(h)).

A. It is clear that this exception for "misrepresentation" bars negligent, as well as wilful, misrepresentation. Five circuits have so held, and this interpretation is supported by the structure of the Tort Claims Act, its history, and the general principles of tort law.

B. Despite respondents' contention that their claim is basically for the negligent making of the F.H.A. appraisal, it is plain that the communication of the inaccurate appraisal is an indispensable element in their cause of action. Without that communication, they would have no claim. In comparable circumstances, the lower federal courts have regularly refused to allow plaintiffs to avoid the exclusionary provisions of the Tort Claims Act, including the "misrepresentation" exception, by formulating claims in artificial terms. In particular, with respect to misrepresentation the common-law decisions likewise in-

dicate that that tort includes negligence in ascertaining the facts, as well as lack of due care in the transmission of information. Until the instant case, the federal courts have applied the same principles under the Tort Act. To hold otherwise would be to cut the core from the "misrepresentation" exception of Section 2680(a), and to welcome a mass of suits against the government for supplying erroneous information—actions which Congress desired to exclude from its waiver of immunity in the Tort Act.

ARGUMENT

I

THERE EXISTS NO ACTIONABLE DUTY ON THE PART OF THE GOVERNMENT, TO A PURCHASER OF PRIVATE PROPERTY, ARISING OUT OF A FEDERAL HOUSING ADMINISTRATION APPRAISAL MADE FOR PURPOSES OF GOVERNMENT INSURANCE OF A PRIVATE MORTGAGE

Our first position is that the Federal Housing Administration, in making its appraisals of property, owes no actionable duty of due care to subsequent or prospective purchasers of the property. Rather, the inspections and appraisals are made primarily to aid the government in determining whether and how much to insure the prospective morgage loan. No rights against the United States accrue to the prospective purchaser if the inspection or appraisal should happen to be negligently made. The government may find that it has insured the loan for too high an amount, but the private purchaser has no legal redress against the United States.

A. The portion of the National Housing Program with which we are here concerned [15] consists of the insuring or guaranteeing of mortgages by the Federal Housing Administration. This insurance runs to a lender-mortgagee, upon whose application it is granted. *Supra,* pp. 4–6.[16] During consideration of the original Housing Act in 1934, Senator Barkley explained that, because of "the guaranty of approved mortgages, more private capital will be induced to go into these lending institutions for the purpose of putting loans on homes." [17] Senator Barkley added that the purpose of the Act was "to have the fear taken out of the investor." [18] The mechanism, it was explained, would be through "a guarantee of mortgages." [19]

It was contemplated that this program would not be at the expense of the public treasury.[20] The insurance would be financed by an annual premium charged to the mortgage.[21] In addition, any mortgagee who foreclosed on a mortgage, and received the benefit of the insurance provision, was required to transfer to the Federal Housing Administration the

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[15] Section 203 of the National Housing Act, 48 Stat. 1248, as amended, 12 U.S.C. 1709, *supra*, pp. 2–3.

[16] Section 203(a) of the Act, 48 Stat. 1248, as amended, 12 U.S.C. 1709(a).

[17] 78 Cong. Rec. 11980.

[18] 78 Cong. Rec. 11981.

[19] 78 Cong. Rec. 11981.

[20] 78 Cong. Rec. 11983.

[21] Section 203(a) of the Act, 48 Stat. 1248, as amended, 12 U.S.C. 1709(a).

title to the property, which the Administration could then manage or dispose of for the financial benefit of the insurance fund.[22]

Moreover, the mortgagee was required to assign to the Administration any claims which it possessed against the mortgagor or others arising out of the mortgage transaction or the foreclosure proceedings.[23] Thus, as was stated several years later by the House Committee on Banking and Currency,

> In the case of the FHA-insured-mortgage system, the contingent liability of the Government is protected, in the final analysis, by the value inherent in the properties underlying the mortgages the FHA insures.[24]

As an integral part of the protection of the government, Congress provided that, to be eligible for government insurance, the mortgage must involve no more than a certain percentage of the "appraised value of the property."[25] This appraisal, it was said by the House managers in the conference committee that reported out the bill which became the Housing Act of 1954 (see *infra*, pp. 20–29), is

> obviously essential to the proper underwriting of mortgage loan risks, and therefore oper-

[22] Sections 204 (a) and (g) of the Act, 48 Stat. 1249, 1250, as amended, 12 U.S.C. 1710 (a) and (g).

[23] *Ibid.*

[24] H. Rept. 1686, 81st Cong., 2d Sess., pp. 32–33.

[25] Section 203(b) of the Act, 48 Stat. 1248, as amended, 12 U.S.C. 1709(b).

> ate[s] primarily for the protection of the Government and its insurance funds.[26]

B. Of course, it was early recognized that the government appraisal of the property, the mortgage on which was to be insured, along with other features of the mortgage-insurance program, would operate to the benefit of the prospective purchaser, as well as the government. In the 1934 debates on the first Housing Act, Senator Barkley stated that the Act "will take the fear very largely out of the home owner, as well as out of the investor."[27]

The F.H.A. in its first annual report recognized that through the mortgage-insurance program the "borrower receives substantial protection against the kind of mistakes in judgment which are likely to be made by a family not experienced in buying a home, or in home property values."[28] An important element of this protection was described as follows:

> He [the borrower] will also have what probably only a small percentage of home buyers have ever had in the past: the benefit of knowing the appraised value set upon the property which he intends to buy or build, by a trained

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[26] H. Rept. 2271, 83d Cong., 2d Sess., p. 66. In its first report, the F.H.A. stated that "[i]nsurance is granted" only for a "sound loan," which must meet two requirements: "(1) it must be one which the borrower reasonably can be expected to repay * * *; (2) it must be secured adequately by a dwelling the value of which will reasonably protect the gradually diminishing outstanding principal, with a fair margin of safety." 1st Annual Report of the Federal Housing Administration, 15 (1935).

[27] 78 Cong. Rec. 11981.

[28] 1st Annual Report of F.H.A., 17 (1935).

> valuator acting in accordance with a procedure designed to reduce to a minimum errors that might result from casual or hasty conclusions.[29]

A second benefit to the home buyer from the F.H.A. appraisal, early recognized, was that the "[p]urchase of homes at inflated values will tend to be discouraged. This will exert a powerful influence against speculative booms in real estate * * *."[30]

But nowhere in the legislative consideration was there ever any hint that the government was insuring or guaranteeing or representing to the home purchaser that he was receiving a certain value for his property. The Housing Act, its rather extensive legislative history, and the reports of the F.H.A. all show that Congress so far as the F.H.A. appraisal was concerned—and apart, of course, from the need and desirability of stimulating building construction and making homes available to millions who otherwise could not afford to purchase them—intended only to guarantee to lenders the repayment of amounts loaned. The incidents of this program, including the appraisal, were primarily designed to that end. Any other tangential benefits to the purchaser were recognized and welcomed, but the controlling aim of the

[29] *Ibid.* See also 90 Cong. Rec. A2985; 2d Annual Report of F.H.A., 6; 4th Annual Report, 15; 5th Annual Report, 21; 6th Annual Report, 9; 11th Annual Report, 9; 12th Annual Report, 8. And see also, Hearings before the Senate Committee on Banking and Currency on the National Housing Act, 73d Cong., 2d Sess., at 58, 127; Hearings before the House Committee on Banking and Currency on Amendments to National Housing Act, 75th Cong., 2d Sess., at 84; Hearings before the House Committee on Banking and Currency on Amendment of the National Housing Act, 78th Cong., 1st Sess., at 8.

[30] 1st Annual Report of F.H.A., 18; see also 2d Annual Report of F.H.A., 6.

program, in the view of Congress, was to make available mortgage fianancing with which homes could be obtained.

C. In 1954, Congress added Section 226 to the National Housing Act (*supra*, p. 3).[21] This section, on which the court below relied heavily (R. 63), directs the F.H.A. to require the seller or builder of any property the financing of which is insured under this program to deliver to the purchaser a written statement setting forth the amount of the appraised value of the property as determined by the F.H.A. This provision made no change in the F.H.A. appraisal system. Nor did it alter the housing program from one of insurance of repayment of mortgages to one of warranty of construction or guarantee of value received by the purchaser, or give the purchaser a legal right to an accurate appraisal.

1. The terms of Section 226 do not purport to bind the government in any way, or to award the purchaser any rights against the government. All that the section provides is that the F.H.A. shall require the seller to make available to the purchaser a written statement of the F.H.A.-appraised value of the property. On its face the provision does no more than assure that the seller passes on to the purchaser the F.H.A.'s appraisal which is to form the basis of the government's guarantee of the loan. There is no suggestion in the language of the section that the

[21] Section 226 of the Housing Act of 1954, 68 Stat. 607, 12 U.S.C. 1715q (1952 ed. Supp. IV). A 1957 amendment to Section 226 is immaterial in its content; also, it was enacted after the transaction with which we are here concerned. Section 115 of the Act of July 12, 1957, 71 Stat. 298, 12 U.S.C. 1715q.

government, which theretofore had not been liable to the purchaser for a faulty or defective appraisal, was now to be responsible in damages to the purchaser. The purpose would appear to be only to give the purchaser the benefit of certain information (*i.e.*, the F.H.A. appraisal) which he might not have obtained under the seller's prior practice.

2. The legislative history of the section furnishes support for the conclusion, suggested by the bare words of the provision, that Congress intended to give the purchaser additional protection *against the seller,* not to establish a new liability on the part of, and remedy against, the United States.

a. Section 226 was written as a part of an attempt by Congress to correct abuses (on the side of sellers) that had appeared in the housing program, and to prevent the liberalized credit terms in the 1954 Act from causing higher prices for houses instead of providing lower income groups with increased opportunity to purchase homes, as Congress intended.

Prior to the enactment of the 1954 Act, Congress had recognized that many purchasers under the F.H.A. program were receiving homes that soon became uninhabitable because of slipshod construction methods or other failures to construct the houses in accord with approved specifications. Others in this program and in the F.H.A. home-modernization program were being defrauded by overcharges and by assertions that a

particular contractor or home was F.H.A.-approved.[32] As the Senate Committee report indicates, these abuses "were at the expense of the borrower."[33]

Because of these disclosures, Congress was concerned with improving the protection available to the borrower—the home purchaser (under the mortgage-insurance program of Title II of the Housing Act) and home owner (under the home improvement loan insurance program of Title I)—*in relation to the seller or contractor,* so as to protect the borrower from "being taken advantage of by salesmen and dealers and bankers and others."[34] Congress was also concerned lest the purpose of the more liberal financing provided in the 1954 Act,[35] which was intended to have

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[32] See, generally, Hearings Before the Subcommittee on Housing of the House Committee on Banking and Currency on Housing Constructed under VA and FHA Programs, 82d Cong., 2d Sess.; Hearings Before Senate Committee on Banking and Currency on Housing Act of 1954, 83d Cong., 2d Sess., 1303–2029; S. Rept. 1472, 83d Cong., 2d Sess., 2; H. Rept. 2271, 83d Cong., 2d Sess., 63; 8th Annual Report, Housing and Home Finance Agency, 6–7, 92–93 (1954); 100 Cong. Rec. 12352.

[33] S. Rept. 1472, 83d Cong., 2d Sess., 11.

[34] Hearings Before the Senate Committee on Banking and Currency on the Housing Act of 1954, 83d Cong., 2d Sess., at 1441. See also *id.* at 1454, 1654, 1656, 1700; S. Rept. 1472, 83d Cong., 2d Sess., 94; Hearings Before the Subcommittee on Housing of the House Committee on Banking and Currency on Housing Constructed Under VA and FHA Programs, 82d Cong., 2d Sess., 39–40, 41, 80, 82–83, 112, 132; Hearings Before House Committee on Banking and Currency on Housing Act of 1954, 83d Cong., 2d Sess., 211–212.

[35] Section 104 of the Act, 68 Stat. 591, amending Section 203 of the National Housing Act, 12 U.S.C. 1709(b), raised (1) the maximum permissible ratios of loans to appraised values of existing homes to 90 percent of the first $9,000 of value plus 75 percent of the balance from the previous maximum of 80 per-

the result of lowering down-payments,[36] be thwarted. Though these liberalizing provisions were designed "to bring home ownership within the reach of more families,[37] Congress had received testimony that, without adequate safeguards, "unwarranted and unintended price increases" would result in "diverting the benefit from the buyer to the seller and negating the purpose." [38]

This double concern for strengthening the hand of the buyer *as against the seller* and for preventing the frustration of the purpose of the liberalized credit terms resulted, for one thing, in the requirement that the seller inform the buyer of the appraised value of the property. The purpose of this provision was to help the prospective purchaser in his negotiations with the seller. This seems clear from the committee reports.

The Senate committee, which inserted this section in the 1954 Housing Act, explained its action in the same terms used in the hearings: "With the more lib-

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cent, and (2) raised the maximum dollar amounts of mortgages eligible for insurance. In addition, Section 105 extended the maximum mortgage term to thirty years.

[36] See S. Rept. No. 1472, 83d Cong., 2d Sess., 17–18; H. Rept. No. 1429, 83d Cong., 2d Sess., 3–5, 12–13.

[37] Hearings Before the House Committee on Banking and Currency on Housing Act of 1954, 83d Cong., 2d Sess., 300; see, to the same effect, S. Rept. 2271, 83d Cong., 2d Sess., 67; H. Rept. 1429, 83d Cong., 2d Sess., 12–13; 100 Cong. Rec. 7612, 7617.

[38] Hearings Before the House Committee on Banking and Currency on Housing Act of 1954, 83d Cong., 2d Sess., 300; Hearings Before the Senate Committee on Banking and Currency on Housing Act of 1954, 83d Cong., 2d Sess., 948.

eral FHA terms and now that mortgage funds are easier to obtain, both agencies [FHA and VA] must be extra careful lest they allow these liberal credit provisions to be translated, even gradually, into higher valuations."[39]

The same reasoning was used by the managers on the part of the House in explaining to the House the "importance" of accepting this appraisal-statement provision:

> [B]y providing the new and more liberal mortgage insurance terms contained in the conference substitute, the Congress is seeking to benefit the individual families seeking to buy homes. The committee of conference desires to assure that these terms would not have an inflationary effect upon the going market prices for homes which might be reflected in upward pressure on prices which, in turn, might be reflected in FHA valuations. An appraisal system, such as FHA's, based on long-term economic value would preclude valuations in excess of carefully estimated replacement costs as an upper limit in respect to new homes, and in excess of replacement cost, less deterioration, in respect to existing homes.[40]

The court below referred (R. 64) to the House managers' accompanying statement that "FHA procedures also operate for the benefit and protection of

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[39] S. Rept. No. 1472, 83d Cong., 2d Sess., 19.

[40] H. Rept. 2271, 83d Cong., 2d Sess., 67. As a second reason for the acceptance of the provision, the committee stated that "in those cases where a reasonable and careful estimate of the costs required to reproduce a fully comparable residential property may, for one reason or another, be less than the current market price for such properties, the individual consumer would obtain the benefit thereof * * *." *Ibid.*

the individual home buyer", and the discussion of Section 226 in that connection, as supporting the view that rights against the government were intended to be accorded by the new provision. But at the same time the managers made clear that the F.H.A. appraisal system (as well as many of its other procedures) "operate primarily for the protection of the Government and its insurance funds" and they recognized "the fact that, technically there is no legal relationship between the FHA and the individual mortgagor" (H. Rept. 2271, *supra,* at pp. 66–67). It seems plain that the emphasis on the protection of the purchaser was intended, not to impose legal liability on the government, but to stress the aid Congress intended to give purchasers vis-à-vis sellers.

In sum, this provision of Section 226, in line with the general philosophy of the 1954 Act,[41] was intended

[41] Other provisions of the Act which accord with this general philosophy include Section 101(a), 68 Stat. 590, providing for lender liability in Title I loan losses, see H. Rept. No. 2271, 83d Cong., 2d Sess., 64; Section 126, 68 Stat. 607, requiring a builder's cost certificate and limiting the mortgage to the maximum percentage of "actual cost"; Section 131, 68 Stat. 609, prohibiting the false or misleading use in advertising of the name of any federal housing agency; and see, in particular, Section 801, 68 Stat. 642, providing with respect to *new* construction, that the "*seller* or *builder*" (emphasis added), rather than the United States, furnish to the purchaser "a warranty that the dwelling is constructed in substantial conformity with the plans and specifications (including any amendments thereof, or changes and variations therein, which have been approved in writing by the Federal Housing Commissioner of the Administrator of Veterans' Affairs) on which the Federal Housing Commissioner or the Administrator of Veterans' Affairs based his valuation of the dwelling * * *." If, as to new homes, Congress required that only the seller, and not the United States, furnish the purchaser with a warranty of construction,

to furnish the home buyer with some additional protection against the seller—in this instance, to see that the purchaser obtained information already given to the seller (the F.H.A. statement of appraisal), information which would help the purchaser obtain the property at a fair price reasonably related to enduring elements of value. But there is no indication in the words of the Act or in its legislative history that Congress intended in 1954 to transform the underlying concept of national housing legislation from a system of "guarantee of mortgages" [42] to one of warranty by the government of construction, or guarantee by the government of value received, or of a right in the purchaser to go against the government for failure to give correct appraisal information. It is hardly to be presumed that such a major shift would occur without some positive evidence that it was intended.

b. The legislative history shows that Congress had no such intention. During the hearings leading up to the 1954 Act, there was repeated emphasis that no relationship existed between the government and the purchaser, the builder, or the vendor—the government's role was only in the insuring of mortgages to the lender, rather than the guarantee of construction or the soundness of the purchase. Representative Dollinger, for example, declared:

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it cannot be assumed—as respondents in effect contend here—that, as to *old* buildings or existing homes, Congress intended to have the construction guaranteed by the United States rather than by the seller alone.

[42] 78 Cong. Rec. 11981. This term was used by Senator Bulkley in response to a question by then Senator Black during the debates on the original Housing Act in 1934.

> The Government did not guarantee, on your getting the home, that the home would be in good condition. / As I pointed out before, there has been a misconception of the idea. The Government never approved the building. All it says is that the FHA loans are guaranteed to the builder or to the bank.[43]

The same question was discussed during the Senate committee's consideration of the 1954 Act, and the same answer was given. In a colloquy with Housing and Home Finance Administrator Cole, Senator Bennett asked:

> I think if we are going to eliminate the possibilities of fraud, we have to do something to make sure that the customer, the borrower, the actual man who signs the note, realizes the limitations of the FHA insurance and is put definitely on notice that the insurance runs to the lender and it is not a protection or a guaranty to him of the workmanship.
>
> We have been talking about title I, today, mostly. Doesn't the same situation exist in the buildings that are built under title II?
>
> Mr. COLE. I think so.
>
> Senator BENNETT. As a Senator, I have had some complaints which would indicate that either through the negligence of the builders or maybe implicit in their silence, there has developed a feeling that a man who has a home built under an FHA-guaranteed or insured mortgage, is somehow protected by the Federal Government and that the Federal Government

[43] Hearings Before the Subcommittee on Housing of the House Committee on Banking and Currency on Housing Construction Under VA and FHA Programs, 82d Cong., 2d Sess., 163; see to the same effect, *id.* at 3–4, 39–40, 41, 84, 85, 109, 117, 125–126, 147, 157–58.

will, if necessary, make sure that his home is exactly as he expected it to be.

Now, does the FHA have the responsibility?

Mr. Cole. * * * I agree with the Senator that the home buyer should understand that the Federal Government is not guaranteeing his home.

Senator Bennett. That is correct. Let's go back to this inspection service for a minute—this, of course, is outside of title I, because there is no inspection and there is no appraisal in title I.

The idea of the inspection service under title II is to protect the Federal Government, which undertakes to insure the loan. The fact that the inspection is made, provides collateral benefits to the property owner. There is no question about that. But in the last analysis the property owner cannot say to the Federal Government, "Well, your inspector inspected my house, and now look what's happened; therefore, you are responsible; therefore, you must come down here and fix it up."

Isn't that a correct statement of the limitation?

Mr. Cole. I think so."[44]

This colloquy underscores what is apparent from a reading of the entire legislative history of this Act: Congress was concerned with protecting the borrower against "being taken advantage of by salesmen and dealers and bankers and others";[45] there was no pur-

[44] Hearings Before the Senate Committee on Banking and Currency on Housing Act of 1954, 83d Cong., 2d Sess., 1402–1403.

[45] Hearings, Senate Committee on Banking and Currency on Housing Act of 1954, 83d Cong., 2d Sess., 1441; see also *id.* at 1454, 1654, 1656, 1700.

pose or design to impose upon the federal government, and therefore the general taxpayer, the legal duty to guarantee to each buyer under a federally-insured financing program a certain valuation of the property he contemplated purchasing, or to assure him that the federal appraisal was carefully made, or to give him a legal remedy against the government for a faulty valuation. The Congress was concerned with giving the buyer certain tools with which he could protect himself against unscrupulous builders or vendors; it did not intend to provide tools for use against the government itself."

3. In these circumstances, Congress' inclusion of Section 226 in the Housing Act of 1954 did not create a duty of due care on the part of the government with respect to the prospective purchaser. In the general law of torts, such a duty arises only where the purpose is primarily and predominantly to protect the third party, not where the dominant purpose of the action or conduct is to protect the actor himself. This is true, in contract law, with respect to third party beneficiaries. It is also true in the private law of torts with respect to third parties who are only incidentally sought to be benefited by actions taken by the person charged with not exercising due care. For instance, in the classic case of

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[46] The magnitude of the government's possible liability, if it could be sued for failure to make a proper appraisal, can be gauged from the fact that, in 1959 alone, some 495,172 mortgages in an aggregate amount of $6,069,418,000, were insured by the F.H.A., following disclosure to the mortgagor of the F.H.A.-appraised value of the property in accordance with Section 226.

Ultramares Corp. v. *Touche*, 255 N.Y. 170, 183, Chief Judge Cardozo said: "In the case at hand, the service was primarily for the benefit of the Stern company [the company ordering the accountants' report], a convenient instrumentality for use in the development of the business, and only incidentally or collaterally for the use of those to whom Stern and his associates might exhibit it thereafter. Foresight of these possibilities may charge with liability for fraud. The conclusion does not follow that it will charge with liability for negligence." See *infra*, pp. 44–45. In the light of the clear purpose of Congress to protect the government primarily, and only incidentally to help the prospective purchaser, by the provision for a F.H.A. appraisal, this principle is directly applicable here.

II

APPELLANTS' CLAIM, IF ACTIONABLE AT ALL, IS ONE "ARISING OUT OF * * * MISREPRESENTATION" AND THEREFORE EXPRESSLY FALLS OUTSIDE THE WAIVER OF SOVEREIGN IMMUNITY IN THE FEDERAL TORT CLAIMS ACT

Even if Section 226 of the National Housing Act is deemed to create an actionable duty on the part of the government toward a purchaser of residential property under the F.H.A. program—a duty which is violated by lack of due care in the appraisal of property for mortgage insurance purposes—respondents' claim against the United States still must fail. For the claim falls within a class as to which Congress has expressly refused to waive the sovereign im-

munity to suit of the United States: claims "arising out of * * * misrepresentation."

INTRODUCTORY

With certain limited exceptions,[47] the federal government prior to 1946 had an "all-encompassing immunity from tort actions." *Rayonier, Inc.* v. *United States,* 352 U.S. 315, 319. In 1946, after "some twenty-eight years of congressional drafting and redrafting, amendment and counter-amendment,"[48] Congress enacted the Federal Tort Claims

[47] See, for example, Public Vessels Act of March 3, 1925, 43 Stat. 1112, 46 U.S.C. 781; Suits in Admiralty Act of March 9, 1920, 41 Stat. 525, 46 U.S.C. 741.

[48] *United States* v. *Spelar,* 338 U.S. 217, 219–220. From 1925 through 1946, when the Federal Tort Claims Act was adopted, some 32 such bills were introduced: 68th Cong.: H.R. 12178 and H.R. 12179 (66 Cong. Rec. 3090); 69th Cong.: S. 1912 (67 Cong. Rec. 1233), H.R. 6716 (67 Cong. Rec. 1552) and H.R. 8914 (67 Cong. Rec. 3339); 70th Cong.: H.R. 9285 (69 Cong. Rec. 1468); 71st Cong.: S. 4377 (72 Cong. Rec. 8489), H.R. 15428 (74 Cong. Rec. 1073), H.R. 16429 (74 Cong. Rec. 2881), H.R. 17168 (74 Cong. Rec. 5342); 72d Cong.: S. 211 (75 Cong. Rec. 191), S. 4567 (75 Cong. Rec. 9540), H.R. 5065 (75 Cong. Rec. 263); 73d Cong.: S. 1833 (77 Cong. Rec. 4962), H.R. 129 (77 Cong. Rec. 88), H.R. 8561 (78 Cong. Rec. 4101); 74th Cong.: S. 1043 (79 Cong. Rec. 442), H.R. 2028 (79 Cong. Rec. 50); 76th Cong.: S. 2690 (84 Cong. Rec. 7834), H.R. 7236 (84 Cong. Rec. 9207); 77th Cong.: S. 1743 (87 Cong. Rec. 5994), S. 2207 (88 Cong. Rec. 417), S. 2221 (88 Cong. Rec. 586), H.R. 5185 (87 Cong. Rec. 5579), H.R. 5299 (87 Cong. Rec. 6024), H.R. 5373 (87 Cong. Rec. 6234), H.R. 6463 (88 Cong. Rec. 691); 78th Cong.: S. 1114 (89 Cong. Rec. 4500); H.R. 817 (89 Cong. Rec. 50), H.R. 1356 (89 Cong. Rec. 250); 79th Cong.: H.R. 181 (91 Cong. Rec. 21), and S. 2177, the "Legislative Reorganization Act," Title IV of which was the Federal Tort Claims Act, enacted as Public Law 601, approved Aug. 2, 1946.

Act, 28 U.S.C. 1346(b), and thereby "waived sovereign immunity from suit for certain specified torts of federal employees." *Dalehite* v. *United States*, 346 U.S. 15, 17. One of the chief purposes of the Act was to make the United States amenable to suit for "ordinary" "common law" torts. That purpose was expressly reaffirmed when the Act was finally passed.[49] But there were certain areas in which Congress did not want to expose the federal government to tort liability.[50] To this end, almost from the first, the bills contained several express exemptions to the assumption of liability. These exceptions were ultimately embodied in Section 421 of the enacted bill, 60 Stat. 842, 845, and now appear in 28 U.S.C. 2680.

At this date there is no room for challenging the traditional and "accepted jurisprudential principle that no action lies against the United States unless the legislature has authorized it." *Dalehite* v. *United States*, 346 U.S. at 30; *Feres* v. *United States*, 340

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[49] See, *e.g.*, 67 Cong. Rec. 11092, 11100, 69 Cong. Rec. 2192, 3118; Hearings before a Subcommittee of the House Committee on Claims, 72d Cong., 1st Sess., on a general tort bill (Feb. 1932), p. 17; Hearings on H.R. 7236, 76th Cong. 3d Sess. (April 1940), p. 16; Hearings on S. 2690, 76th Cong., 3d Sess. (March 1940), pp. 27–8; Hearings on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess. (Jan. 29, 1942), pp. 28, 37, 39, 66; H. Rept. No. 2428, 76th Cong., p. 3; H. Rept. No. 2245, 77th Cong., p. 10; H. Rept. No. 1287, 79th Cong., p. 5; S. Rept. No. 1400, 79th Cong., p. 31.

[50] See, *e.g.*, 67 Cong. Rec. 11086–11100; 69 Cong. Rec. 2191, 2196, 3117, 3127; H. Rept. No. 2800, 71st Cong., p. 9; 86 Cong. Rec. 12021–2; Hearings on H.R. 5373 and H.R. 6463, 77th Cong. (Jan. 1942), pp. 28, 33, 38, 45, 65, 66; S. Rept. No. 1196, 77th Cong., p. 7; H. Rept. No. 2245, 77th Cong., p. 10; H. Rept. No. 1287, 79th Cong., p. 5.

U.S. 135, 139; *United States* v. *Shaw*, 309 U.S. 495; *United States* v. *Eckford*, 6 Wall. 484. Nor can there be any challenge to the corollary of that principle—although Congress in the Federal Tort Claims Act, 28 U.S.C. 1346(b), has authorized suit against the United States for many classes of tortious conduct by federal employees, this authorization does not apply to those classes of torts specifically exempted in 28 U.S.C. 2680. As this Court has stated, "since petitioners obtain their 'right to sue from Congress [* * * they] necessarily must take it subject to such restrictions as have been imposed.'" *Dalehite* v. *United States*, 346 U.S. at 31, quoting from *Federal Housing Adm'n* v. *Burr*, 309 U.S. 242, 251. Cf. *Soriano* v. *United States*, 352 U.S. 270, 273–275.

One of these specific exceptions from coverage—that relating to "misrepresentation"—applies directly to this case.

A. CLAIMS ARISING OUT OF NEGLIGENT MISREPRESENTATION ARE BARRED BY SECTION 2680(h) OF THE TORT CLAIMS ACT

The Tort Claims Act provides in 28 U.S.C. 2680(h) (emphasis added):

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
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> * * * * * *
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, *misrepresentation, deceit,* or interference with contract rights.

Respondents contended in the courts below, and in their brief in this Court in opposition to the grant of certiorari, that the exception as to "misrepresentation" applies only to wilful and not to negligent misrepresentation. Such a narrow reading of the exception is contrary to its clear meaning and to the unanimous holding of five courts of appeals in seven cases.[51] Respondent's contention, therefore, was properly rejected by the court below.

The fact that Congress in Section 2680(h) excluded not only claims arising out of "deceit" but also those arising out of "misrepresentation" indicates a purpose to bar from the Act's coverage both claims based upon deliberate misrepresentation and also those founded upon negligent or innocent misrepresentation. If only deliberate misrepresentations were to be barred, "deceit" alone would have sufficed. The word "misrepresentation," if it is to have any significance,[52] must be construed as something in addition to deceit or deliberate misrepresentation.

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[51] *Jones* v. *United States*, 207 F. 2d 563 (C.A. 2), certiorari denied, 347 U.S. 921; *National Mfg. Co.* v. *United States*, 210 F. 2d 263, 275–276 (C.A. 8), certiorari denied, 347 U.S. 967; *Clark* v. *United States*, 218 F. 2d 446, 452 (C.A. 9); *Miller Harness Co.* v. *United States*, 241 F. 2d 781 (C.A. 2); *Anglo-American and Overseas Corp.* v. *United States*, 242 F. 2d 236 (C.A. 2); *Hall* v. *United States*, 274 F. 2d 69 (C.A. 10); and the instant case (R. 59–60).

[52] "Congress is not to be presumed to have used words to no purpose. * * * [A] legislature is presumed to have used no superfluous words. Courts are to accord a meaning if possible, to every word in a statute." *Platt* v. *Union Pacific R.*, 99 U.S. 48, 58; *62 Cases More or Less* v. *United States*, 340 U.S. 593.

In that connection, it should be noted that most jurisdictions, at least since *Derry* v. *Peek*, L.R. 14 App. Cas. 337, 58 L. J. Rep. Ch. 864 (1889), recognize that deceit will not lie for a negligent misrepresentation,[53] and it is fair to assume that Congress was aware of this rule of law when it added "misrepresentation" to "deceit." Similarly, it may be assumed that the legislators were aware that "misrepresentation" encompasses a field of torts which is "considerably broader than the action for deceit. *Liability in damages for misrepresentation*, in one form or another, falls into the three familiar divisions. * * *—it may be based upon intent to deceive, *upon negligence*, or upon a policy which requires the defendant to be strictly responsible for his statements without either." Prosser, *Torts*, 704, 707, 726 (1941) (emphasis added); see Bohlen, *Misrepresentation as Deceit, Negligence, or Warranty*, 42 Harv. L. Rev. 733, 737–738 (1929); compare *Restatement of Torts*, §§ 525, 552. When Congress used the word "misrepresentation" in conjunction with and contradistinction to "deceit", the purpose was to encompass this area of torts based upon negligent misrepresentation.

The legislative history of this exception to the Tort Claims Act, 28 U.S.C. 2680(h) is consistent with this construction. As we have noted,[54] bills dealing with tort claims had been introduced in Congress since 1923. An exclusionary section virtually identical with 28 U.S.C. 2680(h) first appeared in 1931,[55] and there-

[53] Prosser, *Torts*, 718 (1941).

[54] See note 48, *supra*, p. 31.

[55] Section 206, S. 211, 72d Cong., 1st Sess.

after almost every subsequent tort claims bill carried a similar exception. But there was no explanatory comment until 1940,[56] at which time the hearings contain a statement of the Department of Justice:

> It excepts from the scope of the act a series of torts as to which, for the time being at least, it may be dangerous for the Government to subject itself to suit, until in any event considerable experience has been had under the proposed legislation.[57]

Alexander Holtzoff, then representing the Department, testified:

> Clause 9 proposes to exclude from the cognizance of the law claims arising out of assault, battery, false imprisonment, false arrest, and so forth, a type of torts which would be difficult to make a defense against, and which are easily exaggerated. For that reason it seemed to those who framed this bill that it would be safe to exclude those types of torts, and those should be settled on the basis of private acts. It includes assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.[58]

Referring to the bill which was finally enacted, the Senate Committee stated in its report:

> This section [28 U.S.C. 2680] specifies *types* of claims which would not be covered by the

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[56] The clause was then Section 203(9), S. 2690, 76th Cong., 1st Sess.

[57] Hearings Before Senate Committee on the Judiciary on S. 2690, 76th Cong., 3d Sess., p. 13.

[58] *Id.* at 39.

> title. They include * * * deliberate torts such as assault and battery; *and others.*[39]

Respondents' position that Section 2680(h) does not apply to claims of negligent misrepresentation is premised on the incorrect assumption that all of the other torts specified in Section 2680(h) are deliberate or intentional wrongs. Actions for libel or slander, two of the torts specifically outlawed by Section 2680(h) as a basis for recovery under the Tort Claims Act, may obviously be based on negligent rather than intentional defamation. Even in the absence of any intent to defame, it is settled that liability attaches for publishing the defamation. *Corrigan* v. *Bobbs-Merrill Co.*, 228 N.Y. 58, 126 N.E. 260; *Smith* v. *Utley*, 92 Wisc. 133, 65 N.W. 744; see Prosser, *Torts* (1941 ed.), Sec. 93, p. 818.

Inclusion of "interference with contract rights" in Section 2680(h) also shows that the exception was not intended to be limited to intentional torts. Damages have been regularly allowed for negligent interference with contract rights. Thus, telegraph companies have been held liable for interference with contract rights, caused by negligent transmissions of messages. *Western Union Tel. Co.* v. *Bowman*, 141 Ala. 175, 37 So. 493; *McPherson* v. *Western Union Tel. Co.*, 189 Mich. 471, 155 N.W. 557. And where a child has been injured through negligence, the parent may of course recover for loss of the child's services.

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[39] S. Rep. No. 1400, 79th Cong., 2d Sess. 33; see H. Rep. No. 1287, 79th Cong., 1st Sess. 6. (Emphasis added.)

Louisville & Nashville R.R. Co. v. *Willis,* 83 Ky. 57; *Franklin* v. *Butcher,* 144 Mo. App. 660. Similarly, a negligent interference with the master's contractual right to his employee's services warrants recover for loss of such services. *Ames* v. *Union Ry.,* 117 Mass. 541; *Attorney-General* v. *Valle-Jones,* [1935] 2 K.B. 209; cf. *United States* v. *Standard Oil Co.,* 332 U.S. 301, 312.

That Section 2680(h) excludes from Tort Act coverage negligent as well as intentional torts has been recognized by six courts of appeals in at least nine cases. The Third Circuit held that the exclusion applies to claims of negligent interference with contract rights. *Dupree* v. *United States,* 264 F. 2d 140, certiorari denied, 361 U.S. 823. The Eighth Circuit ruled that a negligent battery was excluded from coverage. *Moos* v. *United States,* 225 F. 2d 705. In the other cases, the courts uniformly held that the section exempted the United States from liability for negligent misrepresentation. *Jones* v. *United States,* 207 F. 2d 563, 564 (C.A. 2),[*] certiorari denied, 347 U.S. 921; *National Mfg. Co.* v. *United States,* 210 F. 2d 263, 275–276 (C.A. 8), certiorari denied, 347 U.S. 967; *Clark* v. *United States,* 218 F. 2d 446, 452 (C.A. 9); *Miller Harness Co.* v. *United States,* 241 F. 2d 281 (C.A. 2); *Anglo-American and Overseas Corp.* v. *United States,* 242 F. 2d 236 (C.A. 2); *Hall* v. *United States,*

[*] "As 'deceit' [in 28 U.S.C. 2680(h)] means fraudulent misrepresentation, 'misrepresentation' must have been meant to include negligent misrepresentation, since otherwise the word 'misrepresentation' would be duplicative. The construction is strengthened by the inclusion of libel which may be either negligent or intentional."

274 F. 2d 69 (C.A. 10); and, as already noted, the court of appeals in the present case properly ruled that the exception includes negligent as well as wilful misrepresentation. 281 F. 2d 596 (R. 59–60).

B. THE GRAVAMEN OF RESPONDENTS' CLAIM IS NEGLIGENT MISREPRESENTATION; IT IS THEREFORE EXCLUDED FROM FEDERAL TORT CLAIMS ACT COVERAGE

Respondents' claim plainly stems from a negligent "misrepresentation," within the meaning of Section 2680(h). At bottom, their position is that they were misled by the communicated "Statement of FHA Appraisal" indicating an appraised value of $22,750. Although their complaint in terms seeks recovery for negligence in F.H.A.'s inspection of the property (R. 1–3), the written opinion of value was a *sine qua non* in the chain of causative events on which the claim is founded. In the words of the statute, the claim is one "arising out of" misrepresentation.

1. The court below held that respondents could go behind the representation and thereby avoid the bar of Section 2680(h) simply by charging negligence in the inspection of the property. But the appraisal inspection may not thus be separated from the statement of appraisal on which respondents claim to have relied. The effect of Section 2680(h) "cannot be avoided by alleging negligence in the act of testing rather than in the words of the representation because in either case the claim 'arose out of' misrepresentation; if there had been no misrepresentation the plaintiff would not have been damaged." *Anglo-American and Overseas Corp.* v. *United States,* 144

F. Supp. 635, 637 (S.D.N.Y.), affirmed, 242 F. 2d 236 (C.A. 2).

In the *Anglo-American* case, the Food and Drug Administration had inspected a quantity of imported tomato paste and issued a "release notice" certifying that the merchandise did not violate statutory pure food standards. On the strength of this notice, Anglo-American purchased the paste and attempted to deliver it to a government agency, pursuant to a previous contract. The agency refused to accept delivery upon determining that the paste was in fact adulterated. In its suit under the Tort Claims Act to recover for the loss thereby sustained, Anglo-American charged actionable negligence solely on the basis of the Food and Drug Administration's inspection of the paste. Nevertheless, the district court and the court of appeals both held that the claim was excluded by Section 2680(h) because it arose out of the negligent misrepresentation embodied in the release notice.

More recently, in *Hall* v. *United States*, 274 F. 2d 69, the Tenth Circuit held a complaint alleging negligence in the testing of plaintiff's cattle for disease to constitute a misrepresentation claim within Section 2680(h). Plaintiff asserted that the government inspectors had, as the result of negligent testing for brucellosis, erroneously determined that his cattle were diseased; that this fact was made known to him; and that he had accordingly been forced to dispose of his herd at less than its fair market value. The court stated (274 F. 2d at 71):

> If we take the literal meaning of the language of the complaint, it seeks to recover damage

resulting from the negligent testing of the cattle for which there would be liability. But there is no claim that because of negligent testing these cattle suffered physical damages * * *.

We must then look beyond the literal meaning of the language to ascertain the real cause of complaint. Plaintiff's real claim is that because of the negligent manner in which these tests were made, the result showed that plaintiff's cattle were diseased; whereas, in fact, they were free from disease and that the Government misrepresented the true condition of these cattle. Plaintiff's loss came about when the Government agents misrepresented the condition of the cattle, telling him they were diseased when, in fact, they were free from disease. The claim is that this misrepresentation caused plaintiff to sell his cattle at a loss. This stated a cause of action predicated on a misrepresentation.

The question also arose in *Social Security Adm'n* v. *United States,* 138 F. Supp. 639 (D. Md.). The United States from time to time audited the books of a federal credit union. Though an employee of the credit union was engaged in embezzlement of funds commencing in 1945, the United States did not discover this fact until 1953. Prior to that time it had reported to the credit union that its books were in proper order. After the discovery of the embezzlement, the credit union brought an action for damages under the Tort Claims Act, alleging negligence in the conduct of the audits. The district court

held that the tort, if any, consisted of misrepresenting that generally accepted audit standards had been followed and that no irregularities existed. Therefore, the action was barred by 28 U.S.C. 2680(h).

To similar effect, *i.e.*, that the Act's exceptions cannot be avoided by artificially formulating a cause of action under a covered category, are the Fourth Circuit's decisions in *Stepp* v. *United States*, 207 F. 2d 909, certiorari denied, 347 U.S. 933 (claim for negligence rejected because facts showed assault and battery, which is also excepted by Section 2680(h)), and *Broadway Open Air Theatre* v. *United States*, 208 F. 2d 257 (claim for wrongful conversion rejected because it really arose in respect of the collection of taxes, within the exception in 28 U.S.C. 2680(c)). And see *Dupree* v. *United States*, 264 F. 2d 140 (C.A. 3), certiorari denied, 361 U.S. 823 (interference with contract rights); *Alaniz* v. *United States*, 257 F. 2d 108 (C.A. 10) (assault and battery); *Klein* v. *United States*, 167 F. Supp. 410 (E.D.N.Y.) (false imprisonment); *Rufino* v. *United States*, 126 F. Supp. 132, 137 (S.D.N.Y.) (assault and battery); *Moos* v. *United States*, 118 F. Supp. 275 (D. Minn.), affirmed, 225 F. 2d 705 (C.A. 8) (assault and battery); *Duenges* v. *United States*, 114 F. Supp. 751 (S.D.N.Y.) (false imprisonment and arrest).

There is thus no justification for going behind an alleged injury caused by a misrepresentation to seek to rely on antecedent negligence. The unbroken line of authority on this question is precisely to the contrary. Here, as in the numerous other cases where

claimants under the Tort Claims Act have not been permitted to avoid the statutory exceptions by clever pleading, appellees may not escape the misrepresentation exclusion by couching their claim solely in terms of negligence in the appraiser's inspection. The proximate cause of their loss was not the negligent F.H.A. examination of the property—for until they learned the results of that inspection they did not suffer, and could not suffer, any harm from it. The communication to, and receipt by, them of the statement of appraisal was the nexus between the inadequate appraisal and their reliance on it. Accordingly, their claim necessarily "arose out of" a misrepresentation, *i.e.*, the communication to them of the appraised value determined as a result of the inspection. It is precisely this type of claim that Congress expressly excluded, in Section 2680(h), from coverage under the Act.

2. The consistent holdings under the Tort Claims Act, that a plaintiff may not avoid the impact of the misrepresentation exception by ignoring the misrepresentation and alleging that all of its consequences actually flowed from some antecedent negligence, are consonant with general common-law principles.

While the common law of misrepresentation varies as between individual American jurisdictions, the commentators are in agreement as to the types of conduct which fall within the category of negligent misrepresentation. Responsibility for this tort may rest upon negligence in the "manner of expression * * *," failure to use "reasonable care in ascertain-

ing the facts * * *," or "absence of the skill and competence required by a particular business or profession." Prosser, *Law of Torts*, p. 541 (2d ed., 1955); see also *Restatement, Torts*, Sec. 552; 1 Harper & James, *Law of Torts*, § 7.6 (1956); Bohlen, *Misrepresentation as Deceit, Negligence, or Warranty*, 42 Harv. L. Rev. 733. Negligent misrepresentation is not confined to cases where information is communicated in a negligent manner, but extends as well to cases where, as here, a representation of fact or professional opinion is based upon a negligent investigation.

The leading American case of *Ultramares Corp.* v. *Touche*, 255 N.Y. 170, 174 N.E. 441; 74 A.L.R. 1139, is illustrative. There, the defendants, a firm of public accountants, were employed by Stern & Co. to prepare and certify a balance sheet exhibiting the condition of its business. After completion of an audit, the balance sheet was prepared, showing capital and surplus intact, and defendants attached their certificate stating that the balance sheet, " 'in our opinion, presents a true and correct view of the financial condition of * * *' " Stern & Co. as of a given date. 255 N.Y. at 174, 174 N.E. at 442.

Plaintiff, relying on the balance sheet as certified, extended credit to Stern & Co. Shortly thereafter, Stern went bankrupt. Plaintiff charged that defendants had been negligent in the conduct of the audit for failing to discover that the company was in fact insolvent at the time the audit was made. The court characterized the suit as one "in tort for damages suffered through the *misrepresentations of ac-*

*countants, the first cause of action being for misrepresentations that were * * * negligent * * * .*" 255 N.Y. at 173, 174 N.E. at 442. (Emphasis added.)

Of particular significance is the English case of *Cann* v. *Willson*, [1888] 39 Ch. D. 39, in which the facts were strikingly similar to those in the case at bar. A landowner, desiring to obtain a mortgage loan on the security of his property, employed the defendants to make a valuation. After surveying and inspecting the premises, they informed the owner's solicitors, in writing, of their valuation. Later, on being specifically advised by the solicitors that the valuation was to be used in obtaining a mortgage, defendants reconfirmed the validity of their appraisal. Plaintiffs, in reliance on defendants' valuation and representations (as communicated to them by the owner's solicitors), made the loan and took a mortgage on the premises as security. The owner subsequently defaulted, and the property was discovered to be worth substantially less than the valuation. In plaintiffs' suit to recover damages from the appraisers on account of their failure to use the "proper care, skill, and diligence in making the valuation * * *"[61] the court held, *inter alia*, that they were liable for misrepresentation.[62]

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[61] 39 Ch. D. at 40.

[62] In *Le Lievre* v. *Gould*, [1893] 1 Q.B. 491, the Court of Appeal held that *Cann* v. *Willson* had been overruled by *Derry* v. *Peek* (1889), L.R. 14 App. Cas. 337. *Derry* v. *Peek* is the source of the English rule that an action for negligent misrepresentation may not be maintained unless there is a "contractual nexus or a fiduciary relationship between * * *" the parties. *Candler* v. *Crane, Christmas & Co.*, [1951] 2 K.B. 164, 196 (C.A.).

The court below erroneously relied upon *Glanzer* v. *Shepard,* 233 N.Y. 236, for the contrary proposition (R. 64). In that case, the seller of beans requested the defendants, public weighers, to certify the weight and to furnish the buyer with a copy. This the defendants did. Their certificate was made out in duplicate, one copy to the seller and the other to the buyer. The buyer paid the seller on the faith of the certificate, which turned out to be in error. Though the court stated, through Judge Cardozo, that the defendants were being held for both their "careless words" and their "careless performance of a service" (233 N.Y. at 241), it is clear that the proximate act that injured the buyers and upon which liability was predicated was the "deliberate certificate," containing a misrepresentation of the weight of the beans, and "intended to sway conduct." Judge Cardozo himself explained the *Glanzer* decision in just such terms, when he stated that *Glanzer* "committed us to the doctrine that *words,* written or oral, if negligently published with the expectation that the reader or listener will transmit them to another, will lay a basis for liability though privity be lacking." *Ultramares Corp.* v. *Touche,* 255 N.Y. 170, 181–182 (emphasis added). See also *Doyle* v. *Chatham & Phenix Nat'l Bank,* 253 N.Y. 369; *International Products Corp.* v. *Erie R.R. Co.,* 244 N.Y. 331.

In short, the general law of torts recognizes a wrong such as respondents assert here as the tort of *misrepresentation.* The injury is done, not by physical

conduct, but by the communication of words which mislead, to the reader's (or the hearer's) detriment.

3. The court of appeals below sought to distinguish this case from the other decisions under the Tort Claims Act which have held claims for misrepresentation to be excluded from coverage, see pp. 34, 38–39, 40–42, *supra*, on the ground that here the misrepresentation was a breach by F.H.A. of "a specific duty owed to the plaintiffs as purchasers of the property" (R. 62). That duty, in the court's view, was to take care not to appraise property at an inflated value. The distinction is without substance. As we have pointed out, even if there were such a duty (but see, *supra*, pp. 15–30), the fact remains that, absent the misrepresentation of the property value, the respondents would have gone unharmed. The misrepresentation was the critical factor.

Moreover, an examination of the decisions which the court below attempts to distinguish shows that, in fact, the duty not to misrepresent in those cases is no less specific than that (if any) owing to respondents here. In *National Mfg. Co.* v. *United States*, 210 F. 2d 263 (C.A. 7), certiorari denied, 347 U.S. 967, and in *Clark* v. *United States*, 218 F. 2d 446, 452 (C.A. 9), the information concerning flood conditions published by government employees was specifically for the benefit of the plaintiffs who were among the class of persons likely to be affected by the flood. In fact, in the *Clark* case one of the communications

on which liability was predicated was specifically addressed "To the Residents of Vanport."[63]

Likewise, in *Hall* v. *United States*, 274 F. 2d 69 (C.A. 10),[64] the primary interest in not having healthy cattle represented as diseased would be the interest of the owner of the cattle who relies upon the representation of the government agent.[65] The same is true for the representation as to the condition of the tomato paste in *Anglo-American and Overseas Corp.* v. *United States*, 242 F. 2d 236 (C.A. 2), *supra*, pp. 39–40. Finally, it is clear that the audit made in *Social Security Adm'n* v. *United States*, 138 F. Supp. 639 (D. Md.),[66] was for the benefit of the credit union and its members. In this connection, it should be noted that in the instant case neither F.H.A. nor the appraiser knew at the time of the appraisal that respondents were interested in buying this specific property (R. 15); the appraisal was therefore undertaken for the benefit of a general class of potential mortgagors, not specific individuals.

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[63] 218 F. 2d at 449. Though the courts in the *National Mfg.* and *Clark* decisions, as one ground for their decisions, held that the government owed no duty to anyone to take care to ascertain flood conditions correctly, the court's alternative discussion of the applicability of the misrepresentation exception to the Federal Tort Claims Act clearly was premised *arguendo* on an assumption that a duty was owing.

[64] Discussed at pp. 40–41, *supra*.

[65] Respondents suggest (see Br. in Opp. 4, fn. 2) that in the *Hall* case the duty was owed to the public, not to the cattle-owner. The Tenth Circuit, however, wrote as if the duty, if any, were owed to the plaintiff. See *supra*, pp. 40–41.

[66] Discussed at pp. 41–42, *supra*.

4. Similarly, the court below sought to limit the range of the "misrepresentation" exception by equating the present case with situations in which negligent conduct by the government, misleading the plaintiff, has been held actionable under the Tort Claims Act. The court relied, for instance, on *Indian Towing Co.* v. *United States*, 350 U.S. 61 (holding the United States liable for negligent failure to keep a lighthouse operating), and *Somerset Seafood Co.* v. *United States*, 193 F. 2d 631 (C.A. 4) (finding liability for failure properly to mark a submerged wreck) (R. 62). But those cases differ significantly from this one. Far more than misleading words was involved. The government's negligence consisted in physical conduct which was an integral part of the physical direction or guidance of private action—just as a policeman directs traffic, or a driver signals with his hand or directional lights. It is not surprising that, as the opinion below remarks (R. 62), cases like these contain no discussion of the misrepresentation exception. The government made no such claim because it recognized that to attempt to apply Section 2680(h) to such circumstances would go counter to the congressional purpose by stretching the misrepresentation exemption far beyond its meaning in traditional legal usage. By like token, to use the decision in *Indian Towing Co.* v. *United States* to narrow the misrepresentation exception would conflict with the intention of Congress in enacting Section 2680(h).

In the reading of the court below and of respondents, the misrepresentation exclusion would operate

only where there is no "pre-existing duty of care related to the activity of the government employee" (see Br. in Opp. 4), *i.e.*, only where the sole negligent or wrongful conduct of the government employee lies in the *communicating* of the words. In effect, this interpretation reads the exception out of the Tort Act. The instances in which the only duty of care arises in connection with or as a result of making the representation are few and far between. In the theory and practice of the law of torts, "misrepresentation" has not been so narrowly conceived (see *supra*, pp. 39–47).

5. Finally, it is appropriate to point out the potential consequences of the ruling below in areas outside the concern of F.H.A. There are many fields in which the federal government communicates information to its citizens, for their aid and guidance, and several in which Congress has specifically indicated that such information is to be distributed. A registration statement filed with the Securities and Exchange Commission, and reviewed by that agency, is of course for the guidance of possible investors. The Department of Agriculture makes available a mass of information for use by farmers and the citizenry generally; the Labor and Commerce Departments have similar programs. The cases cited above, pp. 34, 38–39, 39–42, illustrate governmental activities of this type. As Judge Johnsen observed, concurring in *National Mfg. Co.* v. *United States*, *supra*, 210 F. 2d 263, 280 (C.A. 8), certiorari denied, 347 U.S. 967, the "examples could be endlessly compounded, and the amount

of liability that they would involve might be infinite." They could include (*ibid.*) regarding "the Government as having an obligation, for example, to pay a flour miller for the loss sustained by him in relying upon an erroneous agriculture-department report of wheat-crop shortage and having purchased wheat on that basis to take care of his milling needs; or to pay a plumber for his loss from having stocked up on a supply of unmovable bath tubs in reliance upon an erroneous commerce-department census as to the number of homes in his community that are without this facility; or to pay a laborer for his expense and loss of wages in having given up his job and migrated to California in reliance upon some erroneous labor-department statistics as to the amount of work there available in his field or skill."

Contrary to the theory of the opinion below, the "misrepresentation" exception was designed to cover all such communications of information.

CONCLUSION

For the reasons stated, the judgment below should be reversed, and the cause remanded with instructions to dismiss the complaint for want of jurisdiction.

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No. 533

In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, PETITIONER,

v.

STANLEY S. NEUSTADT, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS

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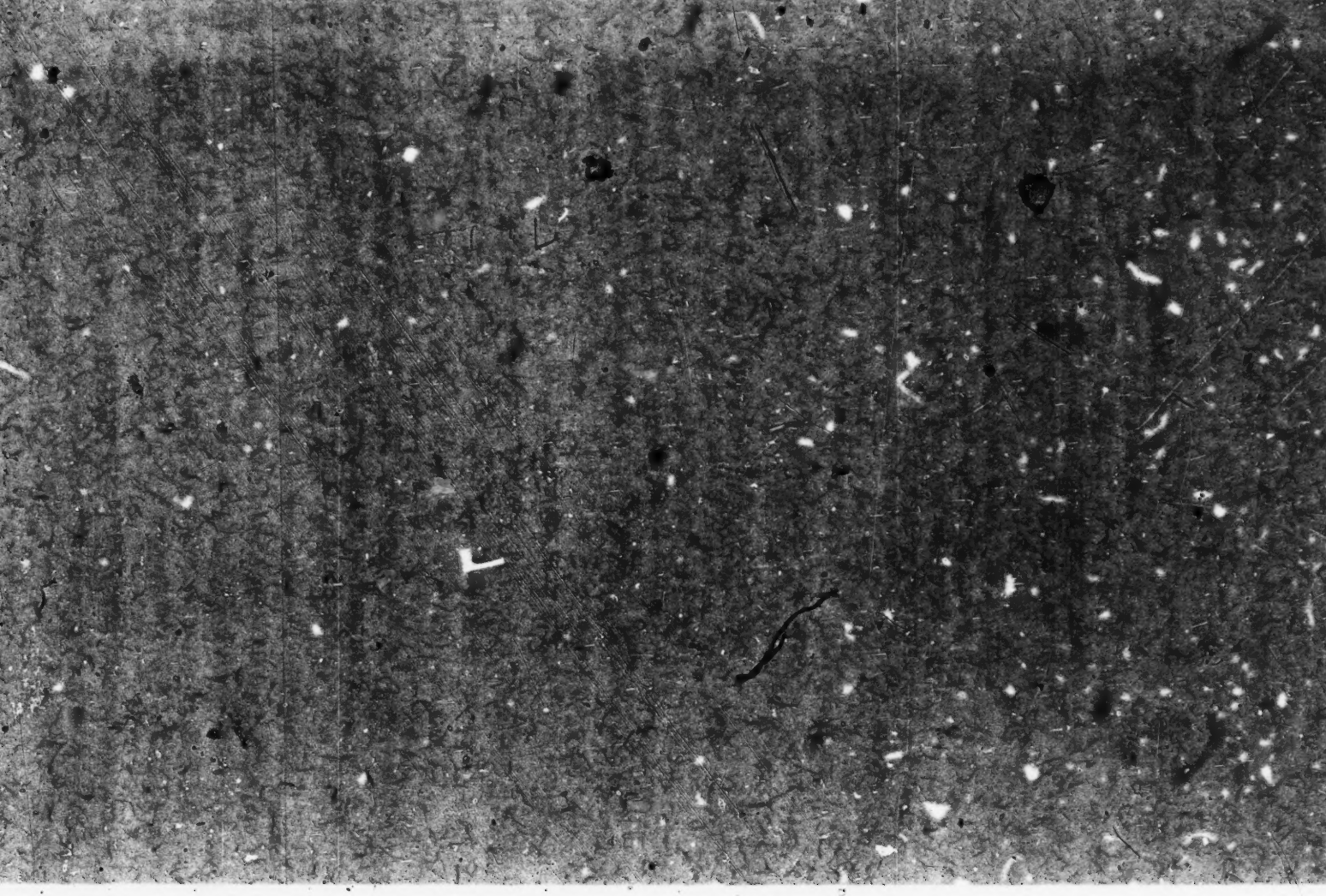

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BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

Whenever an application is made for mortgage insurance under the National Housing Act, an inspection of the premises is made by a qualified professional appraiser, employed by the United States. The inspection here was negligently made. The questions presented are:

1. Does the United States owe a duty to a prospective purchaser of the premises to conduct this inspection with due care?

2. If there is such a duty, is a Federal Tort Claims action for the recovery of damages, resulting from a negligent

inspection, essentially a negligence action or one for misrepresentation?

3. Even if the action is considered to be based upon misrepresentation rather than negligence, does the "misrepresentation" exception in the Federal Tort Claims Act immunize only willful or deliberate misrepresentations or does it also include negligent misrepresentations?

STATUTES INVOLVED

1. Section 203 of the National Housing Act (Act of June 27, 1934, ch. 847, 48 Stat. 1248), as amended, 12 U.S.C. 1709 (1952 Ed., Supp. IV), provided in pertinent part as follows:

> (a) The Commissioner is authorized, upon application by the mortgagee, to insure as hereinafter provided any mortgage offered to him which is eligible for insurance as hereinafter provided, and, upon such terms as the Commissioner may prescribe, to make commitments for the insuring of such mortgages prior to the date of their execution or disbursement thereon . . .
>
> (b) To be eligible for insurance under this section a mortgage shall—
>
> . . . . . .
>
> (2) Involve a principal obligation (including such initial service charges, appraisal, inspection, and other fees as the Commissioner shall approve) in an amount . . . not to exceed an amount equal to the sum of (i) 95 per centum . . . of $9,000 of the appraised value (as of the date the mortgage is accepted for insurance),

and (ii) 75 per centum of such value in excess of $9,000 . . .

2. Section 226 of the National Housing Act (Act of June 27, 1934, ch. 847,, as added by the Housing Act of 1954 (Act of August 2, 1954, ch. 649, § 126, 68 Stat. 607), 12 U.S.C. 1715q, provides in pertinent part as follows:

> The Commissioner is hereby authorized and directed to require that, in connection with any property upon which there is located a dwelling designed principally for a single-family residence or a two-family residence and which is approved for mortgage insurance under section 203 . . . of this Act, the seller or builder or such other person as may be designated by the Commissioner shall agree to deliver, prior to the sale of the property, to the person purchasing such dwelling for his own occupancy, a written statement setting forth the amount of the appraised value of the property as determined by the Commissioner . . .

The Federal Tort Claims Act provides in pertinent part as follows:

28 U.S.C. 1346(b)—

> Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2674—

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 U.S.C. 2680(h)—

The provisions of this chapter [28 U.S.C. Ch. 171] and Section 1346(b) of this title shall not apply to—

* * * * * * *

(h) Any claim for damages arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

STATEMENT

The Government has accurately described the relevant provisions of the National Housing Act and the practices followed by the Federal Housing Administration in connection with the issuance of insurance of mortgages secured by existing single family residences. The Government's statement of the particular facts of this case is, however, deficient.

As petitioner has explained (Pet. Br., pp. 5-7), certain standards of eligibility prescribed by the Federal Housing Commissioner must be met before a house is accepted as adequate security for a mortgage that is to be insured by the FHA. Part of the function of the professional technician who visits the house for the purpose of making an appraisal is to determine whether these standards are met. If a substantial defect is found, he may recommend that the house be rated as eligible for mortgage insurance

provided the defect is remedied. On the other hand, if the deficiency is very serious and cannot be economically corrected, the application for mortgage insurance is rejected.[1]

Since insurance is available only after the house has been carefully inspected, a prospective purchaser is thus provided with "the informed judgment of a professional technician"[2] that the house requires no major or unusual repairs. This practice of the FHA has become well-known, certainly to banks, mortgage companies and real estate brokers, and while the record does not reflect whether it was known to the public generally, the respondents were well aware of it.[3]

Respondents originally made an offer to purchase the property at a price of $24,500, conditioned upon their being able to obtain an FHA insured loan of $19,900, the maximum amount permitted under the statute, based upon an appraised value for the property at this contract price.[4] Subsequently, information was received by the seller to the effect that the FHA had appraised the property at $22,750, thereby relieving respondents of their obligation to consummate the transaction.[5]

Respondents were concerned lest the difference between the amount of their offer and the appraised value might have resulted from some serious flaw in the house. Consequently, they made inquiries and were explicitly informed that a serious defect would not result in a reduced appraisal but rather in the comitment to insure being conditioned upon the correction of the defect.[6] Thus reassured,

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[1] R. 40-43.
[2] H. Rept. No. 2271, 83d Cong., 2d Sess., p. 67.
[3] R. 15, 17-18, 49.
[4] R. 16.
[5] R. 16.
[6] R. 17-18, 49.

they entered into another contract similarly conditioned upon their obtaining an FHA insured mortgage, but this time in the amount of $18,800 (the maximum amount insurable under Section 203 on the basis of an appraised value of $22,750). In due course the transaction was closed and respondents took title to the house.

Soon after taking possession, respondents discovered that their home had suffered a serious foundation failure—indeed, so serious that it was not economically feasible to make the necessary repairs.[7] The District Court found, and the Court of Appeals adopted the finding, that the defects in the house would have been discovered by the FHA inspector had he conducted his inspection with due care. Since these findings of the lower courts are not contested by the Government, and since the Government does not contend that respondents were guilty of contributory negligence, it seems unnecessary to summarize the evidence of record on these factual questions, even though a considerable part of the Government's statement appears to be devoted to suggesting that the defects might not have been easily discernible by the FHA inspector. There is ample support in the record, however, for the finding that the inspection was negligently conducted.[8]

SUMMARY OF ARGUMENT

The courts below have found that the respondents' cause of action is the common law tort of negligence; that the United States owed respondents a duty to conduct with due care its inspection of the premises which they purchased; and that the inspection was in fact negligently conducted to the respondents' injury. Respondents' alternative contention—that they were entitled to recover

[7] R. 19-21, 26-31.
[8] R. 27-28, 31-32, 33, 34, 36-37.

even if their action were to be regarded as one based upon negligent misrepresentation, since such an action is not barred by 28 U.S.C. 2680(h)—was rejected by the courts below.

1. The courts below were correct in holding that the Federal Housing Administration owed respondents a duty to conduct a careful inspection of the home which they purchased, when its eligibility for mortgage insurance was being determined. The Government does not contest that the inspection should have been carefully conducted and that it was not. The issue is determination of the class in whose favor this duty of due care runs. The factors that enter into such a determination include the probability that injury to members of the class will result if due care is not observed, the possible extent of liability that may result from a single negligent act, and the purpose or purposes for which the activity in question has been undertaken.

One of the primary objectives of the Federal Housing Administration mortgage insurance program was to provide a prospective home buyer with a degree of protection not available to the purchaser of a home financed through a conventional mortgage. This protection included the advantage of knowing that before any insurance was issued, he would have "the benefit of a careful disinterested examination of the property." The Congress explicitly stated that "it is the intent of Congress that the HHFA and its constituent agencies . . . shall at all times regard as a primary responsibility their duty to act in the interest of the individual home purchaser and in so doing to protect his interest to the extent feasible." Where a governmental function is carried out pursuant to a statute expressly intended to benefit a class of persons and a member of the class is deprived of that benefit because the function is

negligently performed, it can hardly be argued that there is no liability under the Tort Claims Act because the Government owed that person no duty of care. Such a duty of care would have been owed even in the absence of the vigorously stated Congressional purpose. But the existence of such purpose eliminates any possible doubts on this score.

The Solicitor General's argument that the National Housing Act does not provide an express or implied guarantee of the structural soundness of a house financed by an FHA insured mortgage may be correct, but it is wholly irrelevant to the issues in this case. Liability was imposed by the courts below, under the Tort Claims Act, on the basis of the negligence of the Government's employees, and not upon a warranty under the National Housing Act.

2. Assuming *arguendo* that 28 U.S.C. 2680(h) bars an action for negligent misrepresentation as well as for deliberate misrepresentation, it must be determined, where a chain of events leading to the plaintiff's injury includes some form of communication, whether the action is based upon negligence or upon misrepresentation. The Solicitor General's argument that the existence of any communication whatever makes the action one of "misrepresentation" is untenable and is inconsistent with earlier decisions of this Court and of the lower courts. The issue is whether the negligent act or the incorrect representation is the essential element of the wrongful conduct that gives rise to the action. In some cases, as in this one, the answer will be apparent. In others an appropriate test is whether the duty of due care existed when the negligent act was performed, prior to the communication of the results of that act, or whether the duty, if any, arose in connection with or out of the communication itself. Respondents were injured by the negligent inspection. The results of the in-

spection were recorded and communicated to them. But the injury arose from the underlying negligent act and not from the subsequent report.

3. In any event, the "misrepresentation" exception in 28 U.S.C. 2680(h) does not exclude actions based upon negligent misrepresentation. The exception is found in a section of the Tort Claims Act exempting the United States from liability from most of the recognized common law deliberate torts. The legislative history quite plainly confirms that only deliberate torts were intended to be excluded from the wide acceptance of liability found in the Tort Claims Act. A sensible explanation for this exemption is that the commission of wilful torts of this character is not genuinely a part of the employee's performance of a governmental function but is, as a practical matter, "outside the scope of his employment." There is good reason, therefore, for leaving an injured party to an action against the employee himself rather than against the Government.

The Solicitor General asserts that if "misrepresentation" is read to exclude only actions based upon deliberate misstatements, widespread liability will be visited upon the Government. This is not true. Since the United States is liable under the Tort Claims Act only in circumstances where a private person would be liable, the limitations which the common law courts have found it necessary to impose, where damages in very large amounts could conceivably be traced to a single negligent act, provide adequate protection to the United States. There seems no reason, therefore, not to give the term "misrepresentation" the meaning plainly intended by Congress.

ARGUMENT

I. THE UNITED STATES OWES A DUTY TO PROSPECTIVE HOME OWNERS TO EXERCISE DUE CARE IN INSPECTING PROPERTY WHEN DETERMINING ITS ELIGIBILITY FOR FHA MORTGAGE INSURANCE

A. *The theory of this action*

Since petitioners's brief evidences a fundamental misconception of the character of respondents' suit against the Government, it is necessary to begin with a statement of some rather basic principles concerning the nature and theory of an action under the Federal Tort Claims Act.

The dominant purpose of the first major portion of the Government's brief—a purpose which underlies the Government's consideration of both the language and the statutory history of the National Housing Act—appears to be to establish that the Housing Act does not provide a purchaser of a home with a guarantee or warranty that it is worth its appraised value.[9] But of course respondents did not bring their action to enforce a warranty or a guarantee made under the Housing Act or for breach of an implied agreement grounded upon that Act. Rather, respondents sued under the provisions of the Tort Claims

[9] This is a recurrent contention in Petitioner's brief. ". . . [T]he concept of the F.H.A. housing program [is one] of insurance of repayment running to the lender-mortgagee, rather than as a guarantee of construction and value running to the purchaser" (Pet. Br. p. 13). ". . . [N]owhere in the legislative consideration was there ever any hint that the government was insuring or guaranteeing or representing to the home purchaser that he was receiving a certain value for his property" (Pet. Br. 19). ". . . There is no indication . . . that Congress intended in 1954 to transform the underlying concept of national housing legislation . . . to one of warranty by the government of construction, or guarantee by the government of value received . . ." (Pet. Br. p. 26). ". . . [I]t cannot be assumed—as respondents in effect contend here—that, as to *old* buildings or existing homes, Congress intended to have the construction guaranteed by the United States. . ." (Pet. Br. fn. 41, pp. 25-26). As explained in the text above, respondents make no such contention, in effect or otherwise.

Act, which in 28 U.S.C. 2674 makes the United States "liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances," and in 28 U.S.C. 1346(b) gives the District Courts jurisdiction of claims "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment. . . ." This is a tort action grounded upon negligence, not an action on a warranty or guaranty, express or implied.

The Government's brief also occasionally adds to the warranty argument the contention that neither the Federal Housing Act nor its legislative history indicates that Congress intended to impose upon Government employees a duty of care running in favor of the class of persons of which respondents are members. If by this the Government means to suggest that a claimant under the Tort Claims Act is obliged to establish such a Congressional intent, this is another manifestation of the Government's lack of understanding of the nature of the issues which arise in a tort action. The relevant problem in this case is simply that which recurs in every tort action, namely, the problem of defining the class of persons who may recover for damages suffered as the result of the negligence of the defendant or his agents. The resolution of this problem is a judicial function, and depends primarily upon whether injury to the members of the plaintiff's class is reasonably foreseeable if the action in question is negligently performed.[10] Thus there is no statute that states who may recover for the negligent operation of a lighthouse,[11] for the careless fighting of a forest fire,[12] or for the inadequate

[10] 2 Harper and James, *The Law of Torts*, Section 18.2.
[11] *Indian Towing Co.* v. *United States*, 350 U.S. 61.
[12] *Rayonier* v. *United States*, 352 U.S. 315.

marking of a submerged wreck.[13] So, too, a duty of care has been found to exist in favor of a passenger on a commercial airliner whose injury is caused by the negligence of a control tower operator,[14] and in favor of motorists on a highway injured by careless action on the part of Government employees who load surplus material on a purchaser's truck.[15] Liability in such tort actions is imposed by the Tort Claims Act, by which the United States has accepted responsibility under general tort principles for the negligent acts of its employees, and not by the statute which authorizes the action which is negligently performed.

We do not mean by this that the purpose of the pertinent provisions of the National Housing Act is irrelevant to the question of whether the Government owed a duty of due care to respondents in the conduct of the appraisal. On the contrary, where Congress has expressed its intent that a certain action be performed for the benefit of a certain class, and where it is apparent that the negligent performance of the action will deprive the intended beneficiaries of the benefits sought to be conferred, there are compelling reasons for the judiciary to determine that those who perform the action owe a duty of due care to these intended beneficiaries. Thus it is highly significant that, as we show below, the Federal Housing Administration, soon after it was established, recognized its obligations to provide protection to the purchasers of single family dwellings. And when it faltered somewhat in carrying out this obligation it was rather sharply reminded of its failure by the Congress. But the Government, apparently in an effort to diminish the force of these legislative materials, seeks

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[13] *Somerset Seafood Co.* v. *United States*, 193 F.2d 631 (C.A. 4); *Pioneer Steamship Co.* v. *United States*, 176 F. Supp. 140 (E.D. Wisc.).

[14] *Eastern Air Lines* v. *Union Trust Co.*, 221 F.2d 62 (C.A.D.C.), *aff'd*, 350 U.S. 907.

[15] *Stalik* v. *United States*, 247 F.2d 136 (C.A. 10).

to persuade the Court to view them with the wrong questions in mind—whether there is a statutory warranty or guaranty, or an explicit statutory assumption of duty of due care. Given their proper significance, these materials eliminate all doubts as to the existence of a duty of due care in this case.

B. *A Primary Objective of the National Housing Act is the Protection of Purchasers of Homes*

1. *The statutory provisions and their purpose.* The National Housing Act, from the time of its original enactment in 1934, limited the amount of the mortgage that could be insured to a percentage of the "appraised value of the property."[16] In its First Annual Report (at p. 17) the FHA explained how the requirement of an appraisal conferred a benefit upon prospective home owners not available to those who financed the purchases of their homes through conventional mortgages:

> "He [the purchaser] will also have what probably only a small percentage of home buyers have ever had in the past: the benefit of knowing the appraised value set upon the property which he intends to buy or build, by a trained valuator acting in accordance with a procedure designed to reduce to a minimum errors that might result from casual or hasty conclusions."

Subsequent reports of the Agency continued to refer to its role in protecting the borrowers whose loans were secured by FHA insured mortgages. In his Second Annual Report the Commissioner pointed out (at p. 6):

"The valuation and inspections made by trained staff

[16] Section 203(b) of the Act, 48 Stat. 1248, as amended, 12 U.S.C. 1709(b).

> members of the Administration tends . . . to insure that the dwelling is in good physical condition."

Two years later the Fourth Annual Report stated (at p. 15):

> "Although the Federal Housing Administration does not deal directly with the great majority of mortgagors whose home mortagages are insured it is responsible for acquainting present and potential home owners with the terms of the Federal Housing Administration insured mortgages and with the protection afforded to the borrowers under such a mortgage."

A similar statement was included in the Fifth Annual Report (at p. 21) and was followed by the declaration that:

> "The Administration aims that no home owner or home seeker should through ignorance of the insured mortgage plan (1) pay more for the same type of credit, nor (2) incur unnecessary risks through the use of a short-term mortgage, nor (3) enter into a transaction without having the benefit of a careful, disinterested examination of the property."

See also the Sixth Annual Report at p. 9; the Eleventh Annual Report at p. 9; and the Twelfth Annual Report at p. 8.

It is evident from the legislative history of the Housing Act of 1954 that these benefits to prospective home owners were not simply incidental advantages resulting from the mortgage insurance program, but were rather among the principal objectives sought to be achieved.[17] The 1954 Act, which was passed after extensive hearings and Congres-

[17] Hearings Before the House Committee on Banking and Currency on the Housing Act of 1954, 83d Cong., 2d Sess.; Hearings Before the Senate Committee on Banking and Currency on the Housing Act of 1954, 83d Cong., 2d Sess.

sional investigations of the FHA,[18] was a broad measure designed to correct a variety of problems that had arisen in the administration of the housing program. Thus, as the Government has stated, the Act contained amendments that affected many of the programs administered by the Housing and Home Finance Agency, the parent body of the FHA; and considerable attention was given to abuses that had come to light involving the administration of the Title I program (home improvement loan insurance) and the so-called Section 608 Housing Program (multi-family rental properties). But what is important for present purposes is Congress' serious dissatisfaction over the performance of the FHA in connection with its program of mortgage insurance on small homes, both newly constructed and existing.

The Senate Report contains in its introductory section a paragraph, entitled "The Protection of the Consumer," which reflects this concern:

> "While your committee has included a number of tightening amendments and safeguards against possible abuses and irregularities in the administration of the various housing programs, it feels that there is a need for a change in the approach or philosophy of administration that the Federal Housing Administration appears to have manifested thus far. While naturally and properly the FHA should be concerned with protecting its insurance fund, the building and the mortgagee against loss and encouraging profitable programs of construction, and while your committee fully

[18] Hearings Before the Senate Committee on Banking and Currency, FHA Investigation, 83d Cong., 2nd Sess.; Hearings Before a Subcommittee on Housing of the House Committee on Banking and Currency Conducted under Veterans Administration and FHA Program, 82d Cong., 2nd Sess.

> appreciates, as it has stated in the opening paragraphs of this report, the importance of maintaining a high level of housing production, these objectives should not obscure the fact that the *first* responsibility of Congress, and that of any agency administering part or all of the housing program, is to protect and preserve the public interest, in general, and the rights of home owners, in particular. It is your committee's considered opinion, and unless contrary views are expressed or amendments are offered, *that it is the intent of Congress that the HHFA* and its constituent agencies in their administration of the program which they are authorized to carry out *shall at all times regard as a primary responsibility their duty to act in the interest of the individual home purchaser* and in so doing to protect his interest to the extent feasible." (Emphasis supplied.) S. Rept. 1472, 83d Cong., 2d Sess., p. 4.

The bill reported by the Senate and the Act, when adopted, required the builder of a new house to furnish the buyer with a certification that the dwelling was constructed in accordance with plans and specifications on which the FHA or Veterans Administration based its valuation. The Senate Report (at p. 19) explained, however, that:

> "While this affords a measure of protection to the purchaser it does not protect him against all structural defects, poor materials, or poor workmanship. Basically the home owner is dependent upon sound underwriting by the FHA and VA and an effective inspection and compliance program, and your committee would like to direct the attention of the FHA and VA to the importance it attaches to them."

At a later point in the report (p. 48) it was emphasized:

> "It should be noted, as was discussed earlier in the report that the requirement of certification is only supplemental to the compliance inspection systems of the FHA and VA, which are the primary means for insuring the construction of sound homes."

Since no similar certification could be asked of the seller of an existing home, the Senate bill contained a provision, which became Section 226 of the National Housing Act, 12 U.S.C. 1715(q), directing the FHA to require the seller or builder of any property, the financing of which was to be insured by the Administration, to deliver to the purchaser a written statement setting forth the amount of the appraised value of the property as determined by the FHA. This provision was not in the House bill, which had been passed earlier, and so the Conference Report contains a full, and for the purposes of this case a compelling, explanation of the reasons for its adoption:

> "Historically, the fundamental soundness of the whole concept of the FHA home mortgage insurance system has rested on the integrity of its appraisal system as a measurement of the long-term economic value of a given residential property to be underwritten with an insured mortgage loan. Basically, the FHA's appraisal system, as well as many of its other principal procedures (such as its property location standards, its minimum construction requirements, and its inspection system), are obviously essential to the proper underwriting of mortgage loan risks, and therefore operate primarily for the protection of the Government and its insurance funds. Nevertheless, the Congress has consistently recognized—and intended—that, notwithstanding the fact that, technically there is no legal relationship between the FHA and the individual

mortgagor, these FHA procedures also operate for the benefit and protection of the individual home buyer. However, there has apparently been a strong tendency on the part of the FHA to view these procedures as operating *exclusively* for the protection of the Government and its insurance funds. The committee of conference does not believe such a view to be consistent with the intent of the Congress in respect of the basic legislation relating to the FHA in the past, and, as to the future, desires to make it abundantly clear that such is not the case.

"In this connection, the committee of conference calls attention to two specific provisions included in the conference substitute which clearly indicate the intent of the Congress that the protections of the FHA system shall also inure to the benefit of the individual home buyers. * * * The other is the provision which requires that the seller or builder or such other person as may be designated by the FHA Commissioner shall agree to deliver, prior to the execution of a contract for the sale of the property, to the purchaser a written statement setting forth the amount of the FHA's appraised value of the property.

"The committee of conference desires to point out the importance it attaches to the latter provision especially at this particular time, in protecting the individual home buyers. Generally speaking, an appraisal of the long-term economic value of a particular residential property represents the informed judgment of a professional technician as to the dollar amount which a well-informed purchaser, acting without duress or compulsion, would be warranted in paying for such property for long-term use or investment . . ." H. Rept. 2271, 83d Cong., 2d Sess., p. 67.

Thus, this Court has been explicitly informed that the FHA inspection and appraisal system, supplemented by the requirement that a statement of the appraised value be furnished a prospective home buyer, was established not in the Government's own interest, but rather so that the home buyer would have "the informed judgment of a professional technician." It follows, therefore, that plaintiffs were within the class of persons to whom the FHA owed a duty of reasonable care in the conduct of its inspection and appraisal program. And the courts below have found, and petitioner does not contest the finding, that in the instant case these functions were negligently performed to the respondents' injury.

2. *The Solicitor General's contention that Section 226 was adopted to give a prospective purchaser protection against the seller is both irrelevant and without substantial support.* The Solicitor General argues that the legislative purpose of Section 226, which requires a copy of the appraisal to be given the purchaser, is "to give the purchaser additional protection *against the seller,* not to establish a new liability on the part of, and remedy against, the United States" (Pet. Br., p. 21). This contention is but another reflection of the Government's mistaken notion of the nature of a suit under the Tort Claims Act, for the Government's aim is merely to add support to its argument that the Housing Act does not establish a warranty or a guaranty on the part of the Government, and that it does not, of its own terms, impose upon the Government appraisers a duty of due care running in favor of the home purchasers. But, as we have indicated, neither of these considerations is important. To be more specific, it would be irrelevant for purposes of tort law—though arguably the situation in warranty or guaranty is different—even if Congress intended that the appraisal should protect the

purchaser only against the seller, since protection against this hazard is afforded only if the inspection is conducted with due care. And, of course, even the Government does not urge that there can be found in the statute any intention to withdraw the general waiver of sovereign immunity provided by the Tort Claims Act.

Moreover, the fact of the matter is that the danger against which Congress desired to protect the purchaser cannot be as narrowly defined as the Government would wish. From the face of Section 226, and upon the basis of the legislative history cited above, the only reasonable inference is that Congress intended the purchaser to have the normal benefits which flow from the inspection of a dwelling by an independent and competent appraiser—benefits which surely are not limited to protection against unscrupulous or greedy sellers, but which extend, for example, to detection of defects unknown to either party to the sale. The Government's view rests almost entirely upon scattered references to the extensive legislative history of the Act, references which for the most part are directed to other provisions of the legislation under consideration.[19] Moreover, assuming *arguendo* that the narrowly circumscribed Congressional concern postulated by the Government can somehow be strained out of the legislative materials, it would be no more than a generalized concern that is nowhere related to the specific provisions of Section 226.

The remaining portion of the Solicitor General's analysis of the legislative history (Pet. Br., pp. 26-29) is devoted to showing that there is no support for the contention

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[19] Footnote 34 of the petitioner's brief, for example, contains the alleged support for the statement in the text that protection for the buyer, in relation to the seller, was intended. None of the twelve references in this footnote bears remotely upon the provision in the proposd legislation which ultimately became Section 226, and considerable straining is required to find such an intention even with respect to the Title I and Title II new construction programs which are the subject of these citations. See also the references relied upon in footnote 38.

that the National Housing Act embodies "a warranty by the government of construction, or guarantee by the government of value received or a right in the purchasers to go against the government for failure to give correct appraisal information." Since no such contention is involved in this action there seems no need to examine into whether the Solicitor General has succeeded in accomplishing the task he has set for himself.

3. *The fact that a governmental program has several objectives does not excuse a failure to exercise due care in its execution.* It is only in the Government's final argument on this phase of the case (Pet. Br., pp. 29-30) that the legislative materials are discussed in the context of general principles of tort law, as opposed to questions of warranty, guaranty, and specific statutory assumptions of liability. The infirmity of the Government analysis of the legislative materials is perhaps best illustrated by the fact that, having finally turned to the field of tort law, the Government is forced to rely upon principles which are simply non-existent.

The Government's argument is that, since the legislative purpose underlying the Housing Act is "primarily and predominantly" to protect the Government, there can be no tort liability, because in the private law of torts a duty of care arises only in favor of those who are "primarily and predominantly" intended to be protected by the activity in question. Not only is the factual premise of this argument incorrect—as we have shown, the protection of the home buyer was at least *a* primary, if not *the* primary, objective of the Act and of Section 226—but it also appears to be inconsistent with the Government's previous position that the primary purpose of Section 226 is to protect the buyer against the seller. Equally important, however, is the fact that the legal premise, which is stated baldly,

virtually without citation of authority,[20] is also erroneous. To be sure, the determination of the class to which a duty of due care arises, as we have indicated, properly includes an inquiry into the purpose of the activity that has been carelessly performed. But there are other considerations, such as the foreseeability of injury and the existence of a reasonable limitation upon the extent of the injury that may be caused by a single careless act, that are equally significant. The statutes that authorize the carriage of mail by truck will be searched in vain for the expression of a purpose to protect the pedestrian from harm, but he may recover under the Tort Claims Act if he is injured through the negligence of the Government driver. On the other hand, the evident purpose to protect mariners which may be inferred from legislation authorizing the Coast Guard to operate lighthouses aids in describing the protected class when the function is negligently performed. In short, while the expression of a Congressional intent to protect a certain class is weighty indeed when the question is whether a member of that class is owed a duty of care, the absence of such an expression of intent is not by any means controlling.

If the appropriate principles of tort law are applied to this case, the existence of a duty of care owing to respondents is, we believe, perfectly clear. As we have already indicated, the Congressional purpose to benefit home purchasers is a compelling factor. Moreover, even assuming *arguendo* that such a purpose did not clearly appear, the duty of care would arise from other sources. It seems

[20] The only support relied upon is an out-of-context quotation from *Ultramares Corp.* v. *Touche*, 255 N.Y. 170, 174 N.E. 441. This case stands only for the proposition that where the number of persons who might foreseeably be injured by a careless misstatement is exeremely large—where the actor will be exposed "to a liability in an indeterminate amount for an indeterminate time to an indeterminate class"—the duty of care, though it exists, does not run in favor of so large a class.

evident that if an inspection fails to disclose the existence of a structural defect, it is the purchaser who will be injured thereby. Moreover, although the class of prospective purchasers may be large, the injury will be suffered only by one of them and in an amount that cannot be greater than the value of the premises.

We submit, moreover, that liability could be based upon a wholly independent ground. In carrying out its inspection functions the Government has, from the beginning, followed the practice of noting the existence of structural defects and of refusing to insure the mortgage until the defect was corrected. This practice was well known in the industry and was known and relied upon by the respondents. In short, the Government undertook to give warning where there were deficiencies in the property that might have a serious effect upon its market value. It is a universally recognized principle that one who undertakes to warn the public thereby assumes a duty to give adequate warning.

Thus, in *Fair* v. *United States*, 234 F.2d 288 (C.A. 5), the authorities at a military hospital had promised to warn a Miss Cooper of the release of an Army captain who had threatened to kill her and who was known to have homicidal tendencies. He was released without warning and promptly shot and killed Miss Cooper as well as two detectives that she had hired to protect her. The District Court had dismissed the complaint on the ground that the Government owed no duty to the general public to maintain adequate hospital facilities and that the agreement to warn Miss Cooper of the captain's release was a gratuitous undertaking beyond the scope of the authority of the employee who made it. The Court of Appeals reversed, quoting from the statement in *Indian Towing Co.* v. *United States*, 350 U.S. 61, that it was hornbook tort law "that one who undertakes to warn the public of danger and

thereby induces reliance must perform his 'good samaritan' task in a careful manner." So, too, in *Dye* v. *United States*, 210 F.2d 123 (C.A. 6), the Government was held liable under the Tort Claims Act where it had undertaken to give warning of a dangerous condition that existed upstream from an open dam, on the ground that the warning which it gave was not adequate. *United States* v. *Lawter*, 219 F.2d 559 (C.A. 5), involved a claim growing out of the death of plaintiff's wife attributable to the negligence of Coast Guard personnel in the conduct of a helicopter air sea rescue. The court held that the evidence showed that the Coast Guard had followed a long standing practice of taking over rescue operations, and that "under such circumstances the law imposes an obligation upon everyone who attempts to do anything, even gratuitously, for another not to injure him by the negligent performance of that which he had undertaken." [21]

In sum, under general principles of tort law, and by virtue of a Congressional purpose to afford protection to persons such as the respondents, or in consequence of its assumed obligation to perform its functions in this area so as to warn prospective purchasers of any structural defects existing in the building at the time its inspection was made, a duty of due care in favor of respondents existed. How-

[21] A similar holding was made in *Social Security Admin. Baltimore, F.C.U.* v. *United States*, 138 F. Supp. 639 (D. Md.), where liability was sought to be asserted on the part of a credit union for the negligent failure of Government bank examiners to discover embezzelments being made by one of the credit union employees. The Court held that the Government had no duty to make any audit at all. The Court went on, however, to say: "While the Government owed no duty to the plaintiff credit union to make an audit, to verify accounts and records, or to make reports to the plaintiff credit union of what the examiners found, nevertheless, if an examiner did make some sort of an audit in the course of his examination, and the Bureau sent a report of examination to the plaintiff credit union, the government was obligated not to furnish a report which would be a trap for the ignorant or unwary." *Id.*, at p. 650.

ever this duty arose, it was not fulfilled. The uncontroverted finding of the District Court is that the inspection was negligently made and that this negligence was the proximate cause of the respondents' injury. The judgment, accordingly, must be affirmed unless the action is barred by 28 U.S.C. 2680(h). We turn, accordingly, to a discussion of the effect of that section.

II. RESPONDENTS' CLAIM IS NOT BARRED BY 28 U.S.C. 2680(H)

Petitioner accepts the finding of the court below that the FHA inspector was negligent in failing to discover that the house purchased by respondents had a serious structural defect and so was ineligible for FHA mortgage insurance. It asserts, however, that respondents' injury was caused by their receipt of the report of the appraised value of the house, which was required by Section 226 of the National Housing Act. Relying then upon the line of cases stemming from *Jones* v. *United States*, 207 F.2d 563 (C.A. 2), cert. denied, 347 U.S. 921, the Solicitor General argues that the United States has not relinquished its sovereign immunity against claims such as the one at bar. Petitioner's contention, reduced to its essentials, is that when there is any communication involved in a chain of events leading to injury, the claim is barred as one arising out of "misrepresentation" within the meaning of 28 U.S.C. 2680(h).

We believe that the Government's argument must fail for two independent reasons. In the first place, as we demonstrate later in the brief, Congress intended by Section 2680(h) to except only deliberate misrepresentation, not negligent misrepresentation. But even assuming *arguendo* that the exception applies to negligent misrepresentation, we believe that respondents' action is not barred. It is this latter contention to which we turn first.

A. *This Action Is Not One Arising Out Of Misrepresentation Within The Meaning of Section 2680(h), Even Assuming That This Section Covers Negligent As Well as Wilful Misrepresentations.*

The legal test advanced by the Government for determining whether a case falls within the misrepresentation exception in Section 2680(h) appears to be whether an act of misrepresentation was a *sine qua non* in the chain of events which led to the injury. We believe that this simplistic test will not serve to effectuate the intent of Congress and that it is irreconcilable with existing decisional law. But, accepting it as valid for the moment, the fact is that even under this standard respondents should prevail.

The Government has failed to focus clearly upon the chain of events which led to the injury suffered by respondents. Respondents are not complaining of the fact that they were told something that was not true and that in reliance thereon they took action to their detriment. In point of fact, the appraisal report which they received was not given them until the time of the closing of the purchase transaction. By the terms of their contract of sale they were obligated to accept a deed to the property provided only that FHA mortgage insurance was available. It was the availability of this insurance and not the receipt of the appraisal report that caused them to purchase the defective house. Had that mortgage insurance not been issued the respondents could not and would not have purchased the house. They are complaining, then, that the inspector's negligence in the performance of his function of making an inspection of the premises—a function that the Congress has unequivocally stated was intended to offer protection to the prospective home buyer—resulted in the issuance of mortgage insurance and consequently in respondents'

purchase of a defective structure. The fact that there was a communication to them as part of the procedure of providing mortgage insurance is totally irrelevant, since even if through inadvertence the statutory command had not been carried out and this communication had not been made, the same injury, based upon the same negligent act, would still have resulted. Thus it is clear, to use the Government's language, that the communication was not a *sine qua non* of the injury, but that the negligent inspection was. In short, the gravamen of the action is found in the negligent performance of the duty owed to the respondents and not in the fact that the result of this negligent performance was brought to their attention by a report.

This was the analysis of the court below: "It is abhorrent to common sense to hold that the government can relieve itself from liability for neglect of duty owed to an individual merely by telling him falsely that the duty has been faithfully performed; and it cannot be supposed that Congress had any such idea in mind when it included 'misrepresentation' among the exceptions to the statute. Quite clearly the gist of the offense in this case was the careless making of an excessive appraisal so that the home seeker, whom the Commissioner was obligated to protect, was deceived and suffered substantial loss. This was the gravamen of the offense to which the report of the Commissioner was merely incidental." (R. 66). This analysis remains unanswered in the petitioner's brief except for the flat assertion that it was the communication and not the negligent inspection that caused the injury.

The Government has not only misapplied its legal theory to the facts of this case, however. Its more fundamental error lies in the nature of its legal theory. As the court below observed, decisions like *Indian Towing Co.* v. *United States*, 350 U.S. 61, where the Government was held liable for negligence in the operation of a lighthouse, and *Somer-*

set Seafood Co. v. *United States*, 193 F. 2d 631 (C.A. 4), where the Government was held liable for negligence in marking the location of a wrecked ship, indicate that the existence of an element of misrepresentation in the chain of events leading to injury does not establish that the misrepresentation exception is applicable. The Government concedes the correctness of these decisions, but attempts to fit them within its suggested rationale by way of an explanation which we find rather difficult to follow. So far as we are able to understand it, the Government's position appears to be that where the written or spoken word is an element of the conduct complained of, the United States cannot be liable, while if the misinformation is communicated through other means ("physical direction or guidance"), this absolute bar no longer applies. This distinction, we submit, is untenable. To take the situation in *Somerset Seafood Co.*, for example, surely it cannot be urged that had the United States chosen to issue a report to mariners setting forth the latitude and longitude of the submerged wreck, with the information in error because of the negligent failure to ascertain the correct location, there would be no liability because of the misrepresentation exception. See *Pioneer Steamship Co.* v. *United States*, 176 F. Supp. 140, 146 (E.D. Wisc.). Moreover, the Government ignores cases such as *Eastern Airlines* v. *Union Trust Co.*, 221 F. 2d 62, 65, 79 (C.A. D.C.), *aff'd*, 350 U.S. 907, where the Government was held liable on the basis of a jury finding that an airport control tower operator negligently told the pilots of two airplanes that both were cleared to land. See also *Johnson* v. *United States*, 183 F. Supp. 489, 493 (E.D. Mich.); and *United States* v. *White*, 211 F. 2d 79, 81 (C.A. 9).

Furthermore, contrary to the Government's assertion, its test finds no basis in "traditional legal usage." While there has been little occasion for the common law courts

to struggle with problems of categorization since the general abandonment of the causes of action in favor of fact pleading, nonetheless the courts have sometimes examined the question of the basis of liability where both misstatements and wrongful conduct were involved, and they have not adopted the suggestion that the existence of a verbal misrepresentation as one link in a chain of events requires a holding that an action for damages suffered as a result of the entire chain must be considered an action for misrepresentation.

In the well known case of *Glanzer* v. *Shepard*, 233 N.Y. 236, 135 N.E. 275, Judge Cardozo vigorously and persuasively rejected the rigid and unanalytical approach here urged upon this Court by the Government. He stated:

> "Here the defendants are held not merely for careless words * * *, but for the careless performance of a service,—the act of weighing,—which happens to have found in the words of a certificate its culmination and its summary * * *. The line of separation between these diverse liabilities is difficult to draw. It does not lose for that reason its correspondence with realities. Life has relations not capable always of division into inflexible compartments. The molds expand and shrink." 135 N.E. at 226-7.

This approach is, of course, the one adopted by the Court below. It recognized that the gravamen of the complaint here concerns the careless performance of the appraisal and inspection of respondents' property, and that the formal report of the appraisal was not only merely the culmination and summary of that performance, but, as has been noted, an insignificant and unnecessary link in the causative chain of events.

The Solicitor General states, with a carelessness not usual in his briefs, that the court below erroneously relied

upon *Glanzer* v. *Shepard*, because in *Ultramares* v. *Touche*, 255 N.Y. 170, 181-82, "Judge Cardozo himself explained the *Glanzer* decision . . . when he stated that *Glanzer* 'committed us to the doctrine that *words*, written or oral, if negligently published with the expectation that the reader or listener will transmit them to another, will lay a basis for liability though privity be lacking.' " (Pet. Br., p. 46) (The emphasis is that of the Solicitor General.)

The quotation from *Ultramares* v. *Touche* is incorrect, and is, indeed, in direct conflict with the actual decision of the court. The petitioner has quite inexplicably omitted from its quotation the introductory phrase which reads:

> "Three cases in this court are said by the plaintiff to have committed us to the doctrine . . ."

Judge Cardozo then went on to reject this explanation of the three earlier cases, one of which was *Glanzer*, in an opinion which reversed the judgment that had been entered in favor of the plaintiff. The reliance by the court below upon the analysis in *Glanzer* was both justified and eminently correct.

The commentators have been no more concerned than the courts with the question that is presented here. Most of the commentators group together in one section torts involving failure to use reasonable care in ascertaining the facts, the absence of the skill and competence required by a member of a particular business or profession, and negligence in the manner of expression. And they do not differentiate between cases in which negligent conduct is the essential basis for recovery and those in which a misstatement of fact is the significant element. This is because they believe and urge that these torts should be governed by essentially the same principles. See Prosser, *Law of Torts* (2d ed. 1955), pp. 542-3; Bohlen, *Misrepresentation as De-*

ceit, Negligence or Warranty, 42 Harv. L. Rev. 733, 746. They are not concerned with distinctions concerning the basis of liability, since they believe that the end result—liability—is the same. But Prosser, for example, expressly recognizes that to achieve this end one accepted (and approved) method is to carry over the historically recognized negligence action (in which the misrepresentation element is traditionally merged to such an extent with the other misconduct that it is not regarded as a separate basis of liability) to appropriate cases which admittedly involve some misrepresentation, even though they do not fall into a traditionally recognized mold.[22]

The commentators do not, therefore, offer any specific guide for the disposition of the problem presented here. They do not, because the problem is of no concern to them, suggest any standard for determining when the essence of a cause of action concerns "mere talk or failure to talk" rather than the negligent performance of an act. But it is clear from their discussions that recovery has been allowed in cases involving communications, sometimes in negligence and sometimes in misrepresentation, and the choice of the proper form of action plainly does *not* depend on the mere existence of a verbal communication at some stage of the tortious conduct.

What it does depend upon is suggested by the six cases relied upon by the Government in support of the proposition that claims arising out of negligent misrepresentation are barred by Section 2680(h). Whether an action lies in negligence or misrepresentation turns upon whether there was a duty owed to the plaintiff irrespective of the report

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[22] Prosser, Law of Torts (2nd ed., 1955), pp. 541-5; *Weston* v. *Brown*, 82 N.H. 157, 131 Atl. 141; *International Products Co.* v. *Erie R. R. Co.*, 244 N.Y. 331, 155 N.E. 662; *Sult* v. *Scandrett*, 119 Mont. 570, 178 P.2d 405; *Houston* v. *Thornton*, 122 N.C. 365, 29 S.E. 827; *Mulroy* v. *Wright*, 185 Minn. 84, 240 N.W. 116; *Dickel* v. *Nashville Abstract Co.*, 89 Tenn. 431, 14 S.W. 896; *Brown* v. *Sims*, 22 Ind. App. 317, 53 N.E. 779.

or other communication that is made. If there was such a duty then the form of action is the common law tort of negligence. Only where the duty is claimed to arise out of the communication itself is the tort that has been committed that of misrepresentation. This analysis is essentially that made by Judge Cardozo in *Glanzer* v. *Shepard, supra,* in which he emphasized that there was a duty to perform carefully the activity in question (that of weighing beans) running in favor of the plaintiff, which was independent of the fact that the results of the weighing were transmitted to the plaintiff in a report. It is also the analysis adopted by the court below (R. 61-62).

On this analysis none of the cases cited by the Government alleged a cause of action in negligence. Thus, *National Mfg. Co.* v. *United States,* 210 F. 2d 263 (C.A. 8), cert. denied, 347 U.S. 967, and *Clark* v. *United States,* 218 F. 2d 446 (C.A. 9), involved actions to recover for damages to property caused by flood. The plaintiffs alleged that various government agencies had negligently carried out their functions of giving accurate warning and flood information. In both cases the courts held that suits against the United States as a result of flood damage were barred by the 1928 Flood Control Act, which had not been repealed by the Federal Tort Claims Act. As the court stated in the *Clark* case, 218 F. 2d 446, at 452:

> "Neither the United States as land owner nor H.A.P. as landlord owed the tenants any flood fighting duties. The gist of appellant's case against the United States by virtue of the action of H.A.P. and its employees is that H.A.P. undertook to inform and advise its tenants and that it negligently carried out this undertaking and issued false assurances of safety. *Thus* the charge against the United States through H.A.P. is

basically one of negligent misrepresentation.''[23] (Emphasis supplied.)

It is clear, therefore, that in those cases it was the representation itself and not any pre-existing obligation on which the action was grounded. Such, of course, was not the case in *Glanzer* v. *Shepard, supra,* nor is it true of the case at bar.

Miller Harness Co. v. *United States,* 241 F. 2d 781 (C.A. 2), and *Jones* v. *United States,* 207 F. 2d 563 (C.A. 2), cert. denied, 347 U.S. 921, likewise involved situations in which no duty was owed the plaintiff by the United States. In the *Miller Harness* case the plaintiff had purchased surplus government property by bidding thereon, and had specifically inquired whether certain parts were included with the material offered for sale. A Government employee had informed the plaintiff that the parts were included, but upon receipt of the property it developed that they were not. The complaint alleged a cause of action for breach of contract as well as in tort, and the court held with respect to the contract action that the buyer had taken the risk that the boxes of material did not contain the parts which he hoped they would. It appears, therefore, that no duty of care applied in this regard. Consequently, the court was able to hold, with respect to the tort action, that the alleged damage arose solely out of the misrepresentation which had been made over the telephone. Similarly, in the *Jones* case not only was no specific duty of care al-

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[23] Petitioner argues, in the face of explicit holdings in these cases that there was no duty of care owed to the plaintiffs, that the discussion of the "applicability of the misrepresentation exception . . . clearly was premised *arguendo* on an assumption that a duty was owing." (Pet. Br., p. 48, fn. 63.) But as the passage quoted in the text above demonstrates, it would be more accurate to say that the exception was held applicable not in spite of the existence of a duty of care but because a duty of care did not exist.

leged in the complaint, but the complaint in terms alleged causes of action based on the negligent and deceitful statement by government employees of an incorrect estimate of the oil producing capacity of certain lands in which the plaintiff was interested.

The Government also relies heavily upon *Hall* v. *United States*, 274 F. 2d 69 (C.A. 10), and *Anglo-American and Overseas Corp.* v. *United States*, 144 F. Supp. 635 (S.D. N.Y.), aff'd, 242 F. 2d 236 (C.A. 2), but these cases go no further than the cases already discussed. The opinion of the Court of Appeals for the Second Circuit in *Anglo-American* merely stated, in affirming the decision of the District Court, that the claim, brought by a dealer in tomato paste, "arose out of" an assertedly negligent representation of the quality of the paste by Federal employees.[24] The reason for this conclusion appears clearly in the opinion of the District Court. That Court first held:

> "The duty imposed on the defendant under the Pure Food, Drug and Cosmetic Act was a duty primarily owing to the ultimate consumer and not to the innocent dealer. The act shows no concern for dealers in adulterated products. . . . No provision of the Act suggested that [plaintiff] was protected from liability by a prior Government inspection. . . ." 144 F. Supp. 635, 636-37.

It is thus clear that in *Anglo-American* there could have been no finding, such as that made by the courts below in the instant case, that the Government had negligently performed a specific duty owed to the plaintiff. Moreover, when considering the applicability of the exception of Sec-

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[24] The essential facts of this case are set forth in the Government Brief at p. 40.

tion 2680(h) for misrepresentation, the District Court expressly held:

> "* * * [P]laintiff could not have been injured here but for the implied representation that the tomato paste did not violate the Act which it read into the form release notice issued by defendant. Inasmuch as the statute did not require the testing of every import, the mere fact that the tomato paste entered the country and took its place in the stream of interstate commerce did not imply any prior test by defendant. The statute did not impose upon the government an absolute duty to keep out all adulterated food but rather a duty, to the extent of the appropriation provided, to reduce the importation of adulterated food by testing such samples as the Secretary of Health, Education and Welfare deemed advisable. Aside from the representation which might be implied from the form of the release notice, plaintiff could have had no basis to assume that any specific lot of food had been tested." *Id.*, at p. 637.

In the case at bar, however, a different result is required since it is agreed that an inspection of the premises is conducted *in every case* where mortgage insurance is to be issued, that issuance of the mortgage insurance necessarily rests upon an inspection and appraisal and that these facts were known to respondents.

The opinion in the *Hall* case does not set forth the nature of the statute under which the testing of the cattle there involved was conducted. It is quite clear, however, that it could not have been alleged that there was any statutory or other duty of due care owed to the plaintiff by the United States with respect to the testing of the cattle. Certainly, the opinion fails to make any reference

to any such contention. It would appear, moreover, as in the *Anglo-American* case, that the purpose of any such testing program would be the protection of the general consuming public, so that the duty found by the court below finds no analogy in the *Hall* case.[25]

Otness v. *United States*, 178 F. Supp. 647 (D. Alas.), affords an example of a case in which a specific pre-existing duty was owed by the Government to the plaintiff and in which the existence of a verbal representation was, therefore, merely incidental or supplemental to the performance of that duty. In that case, which involved a claim for damage to plaintiff's vessel as a result of the negligent maintenance of maritime aids by the U. S. Coast Guard, judgment was rendered for the plaintiff. Among other things, it had been alleged that a bulletin circulated among mariners by the defendant had given incorrect information with respect to the location of a particular maritime aid. The court held that, although misstatements of fact had been made by the Government, there were antecedent negligent acts involved which constituted a proper basis for judgment against the United States. It stated:

> "Although the plaintiff is not entitled to recover for loss occasioned by reliance upon the negligent misrepresentation of the defendant, this immunity does not absolve the defendant of his responsibility to exercise due care for those duties voluntarily assumed. Therefore, since this defense, though valid and successful in part, does not pierce the negligent acts complained of, said defense is ineffective as a bar to recovery." *Id.*, at p. 652.

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[25] The tests were conducted under a program which included the imposition of severe restrictions upon the transportation in interstate commerce of cattle infected with brucellosis, a disease highly contagious to other cattle. See 9 C.F.R. Part 76.

Thus, the analysis of the lower courts in the instant case is supported by the decisions of the various federal courts which have been confronted with the necessity for determining whether a cause of action is essentially grounded in negligence or constitutes a claim for negligent misrepresentation. When, as in those cases cited by the Government in which recovery was denied, there is no specific duty owed to the plaintiff by the defendant independently of the representation itself, it has been concluded that the action is one for negligent misrepresentation. When, on the other hand, there is a specific duty which has been negligently performed, the action should be treated as one for negligence despite the presence of a communication at some stage in the performance of the duty. Each of the cases relied on by the Court of Appeals, *Indian Towing Co.* v. *United States*, 350 U.S. 61, and *Somerset Seafood Co.* v. *United States*, 193 F. 2d 631 (C.A. 4), involved the negligent performance of a specific duty, and the claims were regarded as sounding in negligence even though the performance of the duty culminated in a representation to the plaintiff. The *Otness* case reached a similar result. And similar analyses may be found in decisions in other jurisdictions. See *Brown* v. *Sims*, 22 Ind. App. 317, 53 N.E. 779 (defendant held liable to purchaser of property for supplying incorrect abstract of title to seller, when defendant was aware that it would be relied on by the purchaser); *Dickel* v. *Nashville Abstract Co.*, 89 Tenn. 431, 14 S.W. 896 (similar to *Brown* case); *Mulroy* v. *Wright*, 186 Minn. 84, 240 N.W. 116 (City Clerk held liable to purchaser of property for issuing to seller incorrect certificate that no assessments applied, knowing that purchaser would rely on it); *Sult* v. *Scandrett*, 119 Mont. 570, 178 P. 2d 405; and *Tredway* v. *Ingram*, 102 Pa. Super. Ct. 459, 157 Atl. 4 (no liability for false statement that materials furnished to

builder had been paid for because no duty of care to prospective mortgagee).

It should be noted that these rules, as they have been applied by the courts, limit sharply the number of cases in which the furnishing of incorrect information by the Government can give rise to liability under the Tort Claims Act. Recovery cannot be based upon the misrepresentation alone since it is necessary to show that there was a duty of care owed to the claimant, not merely when he was given the misinformation, but also when the facts were ascertained. And, of course, it is also necessary to show that there was negligence on the part of the Government employee either in ascertaining or imparting the facts.

B. *The Misrepresentation Exception Was Intended to Include Only Claims Based Upon Deliberate Misrepresentations of Fact*

Assuming, contrary to our view, that respondents' cause of action is grounded in misrepresentation, the action nonetheless would be for *negligent* misrepresentation, and it is our position that the exception of Section 2680(h) was not intended by Congress to include negligent misrepresentations. At the outset, of course, we must agree with the Government that the fact that five Courts of Appeals have rejected the argument we here advance is entitled to considerable weight in this Court. Nonetheless, we respectfully maintain that these lower court decisions are wrong, and that they have failed to give due consideration to the statutory purpose and legislative history of the Tort Claims Act.

1. *The statutory purpose.* On its face, Section 2680(h) reflects an intention on the part of Congress to relieve the United States from liability caused by the deliberate acts of its employees. It includes eleven torts which, except for the omission of trespass, include all of the wilful torts

which were generally known to the common law. The natural inference, therefore, would be that "misrepresentation" was meant to include only wilful misrepresentation. This conclusion, moreover, is fully supported by the legislative history.

The Tort Claims Act was enacted only after consideration by a number of sessions of the Congress.[26] The provision that became Section 2680(h), however, did not change appreciably from the way it read in the original bill that was introduced in the 76th Congress. This provision was explained to the Senate Committee by Judge Holtzoff, at that time a Special Assistant to the Attorney General, as excluding a type of tort that would be difficult to defend against and which could be easily exaggerated. Hearings on S. 2690, before a Subcommittee of the Judiciary Committee of the Senate, 76th Cong., 3rd Sess., p. 39.

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[26] Because the Tort Claims Act, although finally adopted by the 79th Cong., 2d Sess., received only scant consideration in that session, the legislative history relating to the consideration of the virtually identical bills by earlier Congresses is more persuasive than would ordinarily be the case. *United States* v. *Spelar*, 338 U.S. 220, fn. 9, describes the course of Congressional consideration leading up to the adoption of the Act:

> "The shape of the Federal Tort Claims Act was largely determined during its consideration in the course of the 77th Congress. Subsequently the bill was reintroduced without substantial modification or further hearings until its enactment during the 79th Congress. The revised version of the tort claims bill introduced during the 2d session of the 77th Congress, S. 2221, was reported favorably by the Senate Committee on the Judiciary (S. Rep. No. 1196, 77th Cong., 2d Sess.), and passed the Senate. 88 Cong. Rec. 3174. The House Committee on the Judiciary, to which it was then referred, and which had been holding hearings on H.R. 6463, the companion measure to S. 2221, the bill passed by the Senate, reported the bill favorably (H.R. Rep. No. 2245, 77th Cong., 2d Sess.), but it was never considered by the House. It was reintroduced in the 78th Congress (H.R. 1356, 78th Cong., 1st Sess.; S. 1114, 78th Cong., 1st Sess.), but no action was taken and again in the 79th Cong., (H.R. 181, reported in H.R. Rep. No. 1287, 79th Cong., 1st Sess.). It was finally passed by the 79th Congress as part of the omnibus Legislative Reorganization Act. 60 Stat. 842."

A somewhat different explanation was given by Judge Holtzoff to a committee of the House during the same Congress. He explained, referring to the entire section that is now 28 U.S.C. 2680, that there had been exempted "tort claims that would be difficult to defend or in respect to which it would be unjust to make the government liable." [27]

The explanation that these suits would be difficult to defend has been regarded by the commentators as insufficient to justify the exceptions found in Section 2680(h). It is noteworthy, however, that they have uniformly viewed this section as one that deals exclusively with wilful torts. "The reason [that suits will be difficult to defend] is not altogether persuasive since defending against a charge of *wilful* misbehavior should be no more difficult than defending against a charge of negligent behavior." Gellhorn and Schenck, *Tort Actions Against the Federal Government*, 47 Col.L.Rev. 722, 730. "The legislative history contains a thoroughly unpersuasive reason for excepting the specified *wilful* torts." 3 Davis, *Administrative Law Treatise*, p. 470. "Section 421(h) is the 'basket' or general clause of the section excluding 'any claim arising [out of the torts specified in 28 U.S.C. 2680(h)].' These are *deliberate* torts, well established in the common law. . . . These exceptions are in accord with the exclusion of punitive damages under Section 410(a) of the Act and together show the intent of Congress to exclude cases involving malicious and *wilful* torts from the pattern of this remedial legislation." Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 Geo. L.J. 1, 49. See also, Note, *The Federal Tort Claims Act*, 56 Yale L.J. 543. (Emphasis supplied throughout.)

The testimony given by the Department of Justice during consideration of the legislation and the Committee reports

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[27] Hearings before Subcommittee No. 1 of the House Committee on the Judiciary on H.R. 7236, 76th Cong., 3rd Sess., p. 22.

confirm the fact that this general understanding of the function of Section 2680(h) was the correct one. In explaining this provision to the Judiciary Committee of the House of Representatives, 77th Cong., 2d Sess., which was holding hearings on H.R. 5373 and 6463, Assistant Attorney General Shea explained (p. 33):

> "The other exceptions in Section 402 relate to certain governmental activities which should be free from restraint of damage suits or for which adequate remedies are already available. The exemptions include claims arising out of the loss or miscarriage of postal matter, the assessment or collection of taxes or duties, military or naval activity during wartime, the detention of goods by customs officers, deliberate torts, such as assault and battery, and some others."

See also the formal statement submitted by the Department of Justice, at p. 28 of the hearings. Mr. Shea's statement that Section 2680(h) encompassed deliberate torts was adopted in S. Rept. 1196, 77th Cong., 2d Sess., p. 7, and repeated in H. Rept. 2245, 77th Cong., 2d Sess., p. 10, as well as in H. Rept. 1287, 79th Cong., 1st Sess., p. 6, and S. Rept. 1400, 79th Cong., 2d Sess., p. 33, the latter two reports being those of the committees of the Congress that adopted the legislation.[28]

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[28] The Solicitor General quotes only from S. Rept. 1400, 79th Cong., 2d Sess. and appears to argue that because there was a semicolon (rather than a comma, as in the Department of Justice statement to the committee) between the words "assault and battery" and the words "and others," this reflects an understanding by the committee that this section included nonwilful torts as well as deliberate torts. (Pet. Br. p. 37.) If the entire paragraph from which the quotation is taken is read, however, it is apparent that "and others" referred not to the other torts enumerated in Section 2680(h) but to the other exceptions found in the remainder of the section (such as those relating to injuries inflicted during a passage through the Panama Canal or caused by the imposition of a quarantine).

If Assistant Attorney General Shea's explanation is read in connection with Judge Holtzoff's, the purpose of Section 2680(h) becomes evident. It seems clear enough that, while exceptions such as those relating to the regulation of the monetary system might well be regarded as protecting "governmental activities which should be free from the restraints of damage suits," the same could not be said for Section 2680(h) provisions covering, for example, assault and battery. Thus, Mr. Shea must have regarded such provisions as involving activities "for which adequate remedies are already available." This should be considered in the light of the further purpose to preclude recovery of damages in cases where it would be "unjust to make the government liable." This could reasonably be said of deliberate torts, which generally involve wrongs committed by employees in their individual capacities and not as government servants,[29] but could hardly be said of torts such as negligent misrepresentation. In short, only if Section 2680(h) is restricted to deliberate torts can effect be given to Congress' evident purpose to permit recovery except where it would be unjust to make the Government liable and where the injured party could be left to his "adequate remedy" against the individual employee, with the additional remedy of a private bill available for the unusual special case. The negligence that caused respondents' injury in this case is assuredly not the type of conduct that was intended to be encompassed by Section 2680(h). On the contrary, it was precisely the kind of careless act, performed in carrying out a function authorized by law, for which Congress accepted responsibility in Section 1346(b).

The Government does point out that under one analysis it can be argued that some of the other torts excepted by

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[29] "[I]t might be that these exceptions were considered as involving activities which practically, even though not legally, speaking are outside the scope of a government employee's proper official functions. . . ." *Panella* v. *United States*, 216 F.2d 622, 625 (C.A. 2).

Section 2680(h), such as libel and slander and interference with contract rights, can be committed negligently rather than deliberately. (Pet. Br., 37-38.) But the cases relied upon can also be viewed as establishing the doctrine that an actual intent to injure is not a necessary element of these causes of action. The deliberate character of the wrongful conduct is still present, however, and the gist of these actions remains the libel or the assault or the interference with the contract rights. Harper and James, for example, in their treatise on the *Law of Torts* (Sec. 6.10, p. 509) conclude, after an extensive discussion, that "as a general rule liability for negligent interference with contractual relations does not exist." See also their discussion of accidental defamation at pp. 363-364.

Morever, even if it be accepted that unusual instances may be found where the torts set forth in Section 2680(h) were committed because of the negligent rather than the deliberate acts of the defendants, this does not alter the essential nature of these torts as deliberate rather than negligent. The exceptional or idiosyncratic example does not determine the nature and character of the entire class. Any first year law school student would be able to identify the single element, deliberateness, which is common to the torts enumerated by Section 2680(h). The exception should thus not be allowed to disprove the rule or to overcome what was the evident and stated intent of the Congress.

Finally, we think it appropriate to note that some cases relied upon by the petitioner were erroneously decided. In *Moos* v. *United States*, 225 F.2d 795 (C.A. 8), for example, the plaintiff entered a Veterans Administration hospital for treatment of a service-connected injury to his left leg and hip. While he was under an anesthetic the surgeon negligently performed an unnecessary operation upon his right leg and hip. The action was held to be barred by Section 2680(h). The court explained that performing an operation without a patient's consent constituted an

assault and battery, pointing out that a surgeon is liable in such a case without proof of intent or negligence. It did not occur to the court, apparently, that the fact that recovery could be had independently of negligence ought not to have prevented the action from being based upon the actual negligence rather than the technical assault.[30] Thus, a rule of law fashioned to make recovery more readily available to an injured plaintiff was applied to prevent recovery. Had the sounder analysis of the court below been followed it would have been recognized that the gist of the surgeon's offense was his negligence in operating on the wrong leg and a claim that Congress obviously intended to allow would not have been denied.

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[30] In this connection a colloquy between members of the House Judiciary Committee and the Assistant Attorney General during the Hearings on H.R. 5373 and H.R. 6463 in the 77th Cong., 2d Sess., at pp. 33-34, is most instructive:

"Mr. ROBISON: On that point of deliberate assault, that is where some agent of the government gets in a fight with some fellow?

"Mr. SHEA: Yes.

"Mr. ROBISON: And socks him?

"Mr. SHEA: That is right.

"Mr. CRAVENS: Assume a CCC automobile runs into a man and damages him, then under the common law, where that still prevails, is not that considered an assault and is the action based on assault and battery?

"Mr. SHEA: I should think not. I should think under old common law that would be trespass on the case.

"Mr. CRAVENS: Trespass on the case?

"Mr. SHEA: Yes.

"Mr. CRAVENS: I do not remember those things very well but it seems to me that there are some cases predicated on assault and battery even though they were personal injury cases.

"Mr. SHEA: No; I think under common law pleading you have the same writ, but it makes a distinction between assault and negligence.

"Mr. CRAVENS: This refers to a deliberate assault?

"Mr. SHEA: That is right.

"Mr. CRAVENS: If he hits someone deliberately?

"Mr. SHEA: That is right.

"Mr. CRAVENS: It is not intended to exclude negligent assaults?

"Mr. SHEA: No, an injury caused by negligence could be considered under the bill."

2. *The Earlier Cases.* In view of the cogent reasons in support of our construction of the statute it is surprising to find the lower courts in agreement that Section 2680(h) bars suits for negligent misrepresentation. But we believe that an examination of the course of decision that led to this unanimity will disclose that the question has never been the subject of a searching examination by any court, and we suggest further that the reasons advanced by the lower courts for their conclusion are unpersuasive.

The issue first arose in *Jones* v. *United States*, 207 F.2d 563 (C.A. 2), cert. denied, 347 U.S. 921, and was decided in a one paragraph opinion which, we respectfully suggest, was poorly considered. The only reason given by the court for its conclusion that Section 2680(h) embraced negligent misrepresentation was that such a construction was necessary in order to give some content to the term "misrepresentation," in view of the inclusion in the section of the term "deceit." To be sure, the canon of statutory construction relied upon by the court is one of ancient standing and is frequently useful in finding the intent of the legislature where a statute itself is not clear.[31] But as this

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[31] The Solicitor General also relies upon this canon of construction. It seems fair to say, however, that it should be used only with caution. Certainly Congress in drafting legislation, much as lawyers in drafting contracts, frequently falls into the habit of using several words where one would do. Scores of examples could be readily supplied. Three are given below:

(a) Section 2(1) of the Securities Act of 1933, 15 U.S.C. 77b, as well as similar provisions of other federal securities acts, defines "security" as ". . . any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of interest in property, tangible or intangible, or, in general, any instrument commonly known as a security, or any certificate of interest or participation in, temporary or interim certificate for, receipt for or war-

Court has repeatedly stated, "However well these rules [of statutory construction] may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy." *S.E.C.* v. *Joiner Corp.*, 320 U.S. 344, 350-351. "A restrictive meaning for what appear to be plain words may be indicated by the Act as a whole, [or] by the persuasive gloss of legislative history. . . ." *United States* v. *Witkovich*, 353 U.S. 194, 199. It is noteworthy that the Court in the *Jones* case made no effort to examine the legislative history of this provision of the Tort Claims Act.

An equally venerable canon of statutory construction would seek the meaning of an ambiguous word or term by examining the associated words which accompany it in the statute. "It is a familiar rule in the construction of terms to apply to them the meaning naturally attaching to them

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rant or right to subscribe to or purchase, any of the foregoing." Surely either "note" or "debenture" or both could have been omitted without loss.

(b) The phrase "service, route or line" appears in several sections of the Merchant Marine Act of 1936, 46 U.S.C. 1101 ff. See, e.g., Section 21, 46 U.S.C. 1121, and Section 605c, 46 U.S.C. 1175(e). Since 1936 these words have consistently been considered to have identical meanings. Indeed, when the bill was under consideration Mr. Ira Campbell, the principal industry representative, testified: ". . . [T]hroughout this bill the words 'service, routes, lines' seem to be used synonymously." Hearings before the Committee on Merchant Marine and Fisheries on H.R. 7521, 74th Cong., 1st Sess., p. 644. This did not prevent the use of the phrase in the Act as adopted.

(c) 28 U.S.C. 2680(h) excepts from the coverage of the Tort Claims Act "claims arising out of . . . misrepresentation, deceit. . . ." Whether "misrepresentation" be given the interpretation urged by the Solicitor General or that suggested by respondents, the word "deceit" seems to be unnecessary.

from their context. *Noscitur a sociis* is a rule of construction applicable to all written instruments. Where any particular word is obscure or of doubtful meaning, taken by itself, its obscurity or doubt may be removed by reference to associated words. And the meaning of a term may be enlarged or restrained by reference to the object of the whole clause in which it is used." *Virginia* v. *Tennessee*, 148 U.S. 503, 519. "[T]he subtle signification of words and the niceties of verbal distinction furnish no safe guide for construing the act of Congress. On the contrary, it should be interpreted and enforced by the light of the fundamental rule of carrying out its purpose and object, [and] of affording the remedy which it was intended to create. . . ." *Rhodes* v. *Iowa*, 170 U.S. 412, 422.

The "dominating general purpose" of the Tort Claims Act was set forth in *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68-69:

> "The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws. Of course, when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it."

If Section 2680(h) is read in the light of this general purpose there seems no reason whatever to give the term "misrepresentation" the unnecessarily broad meaning adopted by the Second Circuit. Certainly the tests de-

scribed above provide more assurance that the intent of Congress will be effectuated than the formula employed in *Jones*, and, as we have indicated, their application to this case leads to the conclusion that Section 2680(h) does not bar suits based upon negligent misrepresentation.

It is possible that the *Jones* court might have given less attention to the Section 2680(h) issue than it deserved because of the obvious lack of merit of the plaintiff's overall claim. The plaintiff owned some stock in a corporation which held certain leaseholds of oil lands from the United States. Prior to selling the stock he wrote to the Geological Survey and asked for its estimate of the recoverable reserves underlying the land in question. He was told that the reserves amounted to approximately one-third of the actual reserves. Plaintiff had alleged that this information was incorrect and that, had the correct figure been given him, he would not have sold his stock and thus would have made a substantial profit. The very brevity of the court's opinion suggests that the obvious impossibility of permitting such a claim to lie caused it to adopt, uncritically, the first apparently plausible rationale that came to mind.

The other cases cited in the Government's brief appear to have been decided primarily upon the authority of *Jones*, and, at least so far as the opinions demonstrate, without extensive reconsideration of the problem. Moreover, as we have indicated in our prior discussion of these cases, pp. 32-36, *supra*, in each of them there was no duty of care owed by the United States to the plaintiff, and consequently, as in *Jones*, there was no necessity for reliance upon Section 2680(h).

The only reason advanced in these subsequent cases beyond the grounds relied upon in *Jones* is the danger of imposition of excessive liability upon the United States if suits could be maintained for negligent misrepresentation. As the court below put it, "[I]t is reasonable to suppose

that Congress intended to exempt the Government from liability and misinformation carelessly given by its agents to the public in the field of its manifold activities." (R. 59-60.) The Solicitor General, on the other hand, does not adopt this rationale of the court below but does refer to the allegedly drastic consequences that might follow upon affirmance of the judgment below, apparently as an independent ground for reversal.

The short answer to the Government's contention is that given by this Court in *Rayonier, Inc.* v. *United States*, 352 U.S. 315, 319-20:

> "The government warns that if it is held responsible for the negligence of Forest Service firemen a heavy burden may be imposed on the public treasury. It points out the possibility a fire may destroy hundreds of square miles of forests and even burn entire communities. But after long consideration, Congress, believing it to be in the best interest of the nation, saw fit to impose such liability on the United States in the Tort Claims Act. Congress was aware that when losses caused by such negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the government and the resulting burden on each taxpayer is relatively slight. But when the entire burden falls on the injured party it may leave him destitute or grievously harmed. . . . There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it."

There is no support for the position of the court below either in the statutes or the legislative history. But since it is arguably not unreasonable, in seeking to give content to the term "misrepresentation," to assume a Congres-

sional intention to avoid the possibility of enormous liability, it is important to recognize that no such potential liability exists regardless of which of the two suggested interpretations of the term "misrepresentation" is adopted by this Court. The United States is liable under the Tort Claims Act only "to the same extent as a private individual under like circumstances" and only "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." By thus insuring that the Government's liability would extend only this far, the sensible limitations upon the potential liabilities of private persons that have been erected by the common law were also provided the United States.

Since it is to Virginia that we are directed to look for the tort law governing this case, it would appear appropriate to look first to the law of that state to see what these limitations are. However, apparently no one has even urged upon the Virginia courts that a private person should be liable for the types of negligent conduct referred to at pp. 50-51 of the Government's brief.[32] The course of decision in New York, on the other hand, which has already been adverted to both in this brief and by the Solicitor

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[32] Only two cases have been found that bear at all on this issue. In *Valz* v. *Goodykoontz*, 112 Va. 853, 72 S.E. 730, recovery was allowed against a contractor who had assured an employee of a railroad that certain blasting operations had been completed and that it was safe to proceed, when that representation was false and the plaintiff was injured by a subsequent explosion. The court stated that, "It was negligence on his part to have . . . assured the plaintiff of the safety of the place . . . ." In *B.W. Acceptance Corp.* v. *Benjamin T. Crump Co.*, 199 Va. 312, 99 S.E. 2d 606, recovery was allowed by the purchaser of a trust receipt against the distributor with whom it had entered into a distributor agreement, where the distributor had incorrectly informed the plaintiff that it had delivered certain goods to a retailer. This caused plaintiff to believe that its lien had priority when in fact it was subordinate to others. Obviously, in neither case does the rule adopted, by implication or otherwise, suggest the type of liability which the Government fears.

General, affords an excellent illustration of the nature and extent of the liability that has been imposed in this area by the common law courts.

Glanzer v. *Shepard*, 233 N.Y. 236, 135 N.E. 275, in which a public weigher was held liable to the vendee of beans on the basis of an erroneous statement of their weight, has already been discussed, *supra* p. 29. It was followed by *Jaillet* v. *Cashman*, 235 N.Y. 511, 139 N.E. 147, with a claim against the operator of a ticker service for damages which resulted when the plaintiff sold his stock because of an erroneous ticker report. Recovery was denied on the ground that the relationship between the plaintiff and defendant was similar to that between the public and a newspaper publisher.[33] Both the *Glanzer* and *Jaillet* cases were then considered and discussed in *International Products Corp.* v. *Erie R.R. Co.*, 244 N.Y. 331, 155 N.E. 662, in which an importer sued a railroad company for damages suffered when the defendant erroneously identified for plaintiff the warehouse in which certain property of the plaintiff was to be stored by the railroad. The plaintiff was unable properly to insure the property because of this error, and sued for the value of the insurance after a fire in which the property was destroyed. It was held that the railroad was liable to the importer in this instance. The court stated, citing *Jaillet*, that the *Glanzer* rule had its limits—that not every casual response or idle word gives rise to a cause of action, that liability exists, *inter alia*, only where the relationship between plaintiff and defendant is such that in morals or good conscience the one has the right to rely on the other for the information involved, and the one giving it owes a duty to give it with care. This line of cases reached its culmination in *Ultramares Corp.* v. *Touche*, 255 N.Y. 170, 174 N.E. 441, in which liability against a firm of accountants

[33] See also *MacKown* v. *Illinois Publishing and Printing Co.*, 289 Ill. 59, 6 N.E. 2d 526.

that had certified a financial statement on the basis of a carelessly conducted audit was denied, on the express ground that the possible consequence of finding a duty of care by the defendant to the plaintiff would have imposed an unconscionable burden.

These cases clearly establish the error of the Government's suggestion that one of the potential consequences of the ruling below would be to subject the Federal Government to unlimited liability in situations where it communicates information to its citizens generally for their aid and guidance. These cases make it clear that no liability would be found under the common law for erroneous information published to the world at large.[34] Prosser concludes that even where there is an intent to mislead; the doctrine of transferred intent [35] is rejected for the obvious reason that the class of persons who may conceivably learn of a misstatement is so enormous that an impossible burden might be cast on anyone who makes a false assertion, and that this view has been followed by numerous American courts.[36] It further appears that even where there is an intention to influence a very large class of persons, liability is denied for the same reason.[37] And, Prosser concludes, again for the same reasons, there is general agreement that with respect to unintentionally false state-

[34] The Government's reference to the potential liability which might flow from erroneous information contained in a registration statement filed with the Securities and Exchange Commission and reviewed by that agency ignores the commonly known fact that all publications of such statements contain a clear statement that the approval of the agency cannot be inferred from the publication of the statement, a *caveat* which would unquestionably absolve the Government from liability in any event.

[35] *I.e.*, an intent to deceive not only the person to whom a representation is made, but others to whom he might foreseeably retransmit the information.

[36] Prosser, *Law of Torts* (2d ed. 1955), at 539-41.

[37] *Ibid.*

ments liability is similarly restricted. A duty of care will not be found even where it is known that the recipient of information intends to make commercial use of it in dealing with unspecified strangers, as in the case of attorneys, abstractors of title, inspectors of goods, accountants, surveyors or operators of ticker services, because of the possibility of liability so great and so out of proportion to the fault involved.

In the instant case, as in *Glanzer*, this problem is not posed. Only one person could buy the home in question. The limit of the Government's liability, in any event, is the total value of the home, and not, as in the other cases discussed, an unlimited liability to numerous individuals in a class which is theoretically without limit. A single accountant's report or a bulletin to farmers, if incorrect, either intentionally or negligently, might give rise to liability to an unlimited number of different individuals in virtually unlimited amounts. It is a risk which could not be insured against, and it is a risk which common law courts have been unwilling to impose.

This is the tenor of the concurring opinion of Judge Johnsen in *National Mfg. Co. v. United States*, 210 F.2d 263, 280 (C.A. 8), *cert. denied* 347 U.S. 967, which is incorrectly discussed in the Government's brief (pp. 50-51). It is true, as the Government notes, that Judge Johnsen did list a number of situations in which the Government disseminates information, and where, if liability for negligence were found, the claims might be infinite. But he cited these examples in order to establish another valid ground for denying the claim made in that case for damages resulting from the dissemination of erroneous flood information. In his concurring opinion, which in turn was concurred in by a second member of the court, it was held, as respondents urge here, that there is no tort liability in such situ-

ations. He stated that the second ground for denying the claim there presented was (at 279):

> ". . . the equally absolute policy which has always existed in the common law, that the dissemination or nondissemination of public information, not of a personal character, is without any basis of a tort in respect to its accuracy. This has been true where the dissemination is engaged in by a private citizen, such as a newspaper or a radio station, just as much as where it is engaged in by the Government. In both situations, whatever duty of care or of integrity might be argued morally to underlie the gathering or dissemination of such information has been regarded legally as being simply a duty owed to the public at large and not to the individual. And, on historic comon-law principle, where no duty is owed to an individual, there is no basis for him to claim a wrong or a tort against him."

Judge Johnsen's opinion does not support, but rather establishes the lack of basis for, the Government's fears. It expresses concisely the general rule which establishes beyond a doubt that the decision of the court below, limited to the facts here involved, does not subject the Government to unlimited or unconscionable liability, for the simple reason that whereas the factors here present define a common law tort, the situations conjured up by the Government as the basis for its fears do not.[38]

[38] It should also be noted that the Government's reference (Pet. Br., p. 29, fn. 46) to the total amount of mortgage insurance issued by the FHA likewise does not provide a valid ground for fear of unlimited or unconscionable liability under the decision of the court below. The amounts of the individual mortgages insured under the program were unquestionably relatively small. It could hardly be suggested that the great bulk of these appraisals were negligently arrived at. And the problems of proving negligence in the performance of a professional function, such as rendering an appraisal in this area, are well known.

CONCLUSION

The reasoning of the court below is sound in its conclusion that the gravamen of the action is the negligent inspection, and should be adopted by this Court as the basis for its affirmance of the judgment. Should the Court reach the question of the interpretation of the word "misrepresentation" in 28 U.S.C. 2680(h), it should hold that only deliberate misstatements of fact were intended to be excluded from the coverage of the Act and the judgment below should be affirmed on this ground.

Respectfully submitted,

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APRIL 18, 1961.

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No. 533

In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, PETITIONER

v.

STANLEY S. NEUSTADT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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v.

STANLEY S. NEUSTADT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

All of the legal arguments respondents seek to advance in their brief have, we believe, been answered in our main brief. This reply brief is filed only for the purpose of (1) acknowledging an inadvertent and immaterial error in a quotation in the government's brief and (2) noting a significant omission in respondents' brief.

1. Respondents correctly note (Br. 29–30) that the government (Main Br. 46) attributed to Judge Cardozo in *Ultramares Corp.* v. *Touche*, 255 N.Y. 170, a statement which he made only in summary of a party's contention as to the doctrine expounded by

him in *Glanzer* v. *Shepard,* 233 N.Y. 236. There is no question that Judge Cardozo, in the *Ultramares* case, rejects the notion that there may be liability for negligent talk where privity or some other connection or relationship between plaintiff and defendant is lacking. Indeed, at page 30 of our main brief, we emphasize and rely on this phase of the *Utramares* decision. But the point discussed at page 46 in our brief, and for which we referred to the incorrect quotation, was simply that *Glanzer* and the other New York cases stood for the proposition that liability was predicated, not on some physical act preceding the misrepresentation, but rather on the negligent representation itself, assuming that the requisite privity was present. We show below that as to this proposition Judge Cardozo fully concurred in the view that the New York cases can be explained only on the theory that liability was based on the misrepresentation itself, rather than on any prior physical act.

However, urging that in *Glanzer* the New York Court of Appeals held the defendants liable for careless weighing and not for the misrepresentation of the true weight of the beans, respondents argue that the gravamen of their complaint is negligent inspection rather than misrepresentation of value, which they term "an insignificant and unnecessary link in the causative chain of events" leading to their injury (Br. 29). Both respondents' premise as to the meaning of *Glanzer* and their conclusion as to the instant case are fallacious.

In *International Products Co.* v. *Erie R.R. Co.*, 244 N.Y. 331, 337, the Court of Appeals explained its decision in *Glanzer* as follows:

> A public weigher, hired by the seller to weigh goods, realizing that the buyer would rely *on his certificate* in paying therefor, was held liable for *erroneous statements* contained therein. . . . There was so far as appeared no negligence in the act of weighing. The negligence was inferred from the issuance of a false certificate. That was the wrong for which a recovery was allowed. * * * [Emphasis added.]

The same view was, in fact, expressed by the court in *Ultramares Corp.* v. *Touche, supra.* Judge Cardozo explained that in *Glanzer* he had suggested "that the liability there enforced was not one for the mere utterance of words without due consideration, but for a negligent service, the act of weighing, which happened to find in the words of the certificate its culmination and its summary," as an "endeavor to emphasize the character of the certificate as a business transaction, an act in the law, and not a mere casual response to a request for information." 255 N.Y. at 184. He went on to declare that, as the court showed in *International Products Co.* v. *Erie R.R. Co., supra,* "the rendition of a service [*i.e.* the weighing in *Glanzer*] is at most a mere circumstance and not an indispensable condition. The Erie was not held for negligence in the rendition of a service. It was held for words and nothing more. So in the case at hand." *Ibid.* See, to the same effect, *Doyle* v. *Chatham & Phenix Nat'l Bank,* 253 N.Y. 369; *Court-*

een Seed Co. v. *Hong Kong & Shanghai Banking Co.*, 245 N.Y. 377.

Thus, reliance by the court below or by respondents on the *Glanser* doctrine for the theory that respondents were injured in this case by a negligent inspection of property rather than by a misrepresentation of the value of that property, is misplaced. In *Glanser*, the injury was caused by misrepresenting the weight of the beans and not by any negligence in weighing (which was not shown),[1] in *International Products* by misstating the place of storage and not by negligence in ascertaining the facts,[2] and in *Ultramares* by misrepresenting the condition of the company rather than by negligence in ascertaining that condition (which the court held the facts to have shown).[3] In this case, respondents were injured, if at all, not by negligent inspection but by an erroneous representation of the value of the property. Whether the erroneous representation was made explicitly by furnishing the appraisal report to respondents or whether the erroneous representation was made implicitly by fixing the amount of the maximum mortgage insurance available to the respondents,[4] it was clearly the *sine qua non* of the

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[1] *International Products Co.* v. *Erie R.R. Co.*, 244 N.Y. 331, 337; *Ultramares Corp.* v. *Touche*, 255 N.Y. 170, 184.

[2] 244 N.Y. 331, 334–35.

[3] 255 N.Y. 170, 176–179, 184, 185.

[4] It will be remembered that the maximum insurable mortgage is a specified fraction of "the appraised value" of the property. 48 Stat. 1248, as amended, 12 U.S.C. 1709(b)(2) (1952 ed., Supp. IV). See pp. 4–5 of our main brief.

alleged injury. It is obvious that if the inspection had been negligently conducted, but the results not reported to respondents, there would have been no injury. It was only the misrepresentation that caused the alleged damage. This fact, from which the respondents cannot escape, calls for full application of the specific exclusionary provision in 28 U.S.C. 2680(h). To follow respondents' arguments would write out of the Federal Tort Claims Act the exclusion of liability of the United States for the tort of misrepresentation.

2. Respondents attempt to show that Congress, in providing that the home buyer be given a copy of the appraisal statement, intended that the government furnish the buyer "the informed judgment of a professional technician" as to the value of the property which he intends to purchase, so that the buyer could look to the government for compensation where the property in fact proved to be worth less (Br. 13–19). In support of this argument, respondents strongly rely on the report of the congressional conference committee which, they state, furnishes "a full, and for the purposes of this case a compelling, explanation of the reasons for . . . adoption" of Section 226 of the National Housing Act[4] (Br. 17). They quote at length from this report a selected passage tending to show that Congress intended the furnishing of the appraisal statement to the buyer to be for the latter's benefit (Br. 17–18). However, respondents stop the

[4] As added by the Housing Act of 1954, 68 Stat. 607, 12 U.S.C. 1715q.

quotation just at the point where the conference report tells *how* Congress intended the buyer to benefit. When this portion is added to the last sentence of respondents' quotation, we find a different picture from that which they paint:*

> Generally speaking, an appraisal of the long-term economic value of a particular residential property represents the informed judgment of a professional technician as to the dollar amount which a well-informed purchaser, acting without duress or compulsion, would be warranted in paying for such property for long-term use or investment. To a large extent, this is determined by the price at which other properties, which are comparable as to location, type of construction, size, and other amenities, are being freely sold in the open market. But, irrespective of market price, the upper limit for such an appraisal would always be the estimated reproduction cost of the property. Thus, appraisal of the long-term economic value as the basis for insurance of home mortgage loans by the FHA can have two important effects in terms of consumer protection.
>
> *First,* by providing the new and more liberal mortgage insurance terms contained in the conference substitute, the Congress is seeking to benefit the individual families seeking to buy homes. The committee of conference desires to assure that these terms would not have an inflationary effect upon the going market prices for homes which might be reflected in upward

* For convenience, we begin with the last sentence of the portion of the report given by respondents, and continue from there.

pressure on prices which, in turn, might be reflected in FHA valuations. An appraisal system, such as FHA's, based on long-term economic value would preclude valuations in excess of carefully estimated replacement costs *as an upper limit* in respect to new homes, and in excess of replacement cost, less deterioration, in respect to existing homes. Therefore, any temporary cost or price rise, attributable to the new and more liberal mortgage insurance provisions contained in the conference substitute or otherwise, should not be reflected in FHA valuations to the detriment of individual home buyers.

Second, in those cases where a reasonable and careful estimate of the costs required to reproduce a fully comparable residential property may, for one reason or another, be less than the current market price for such properties, the individual consumer would obtain the benefit thereof since the FHA's appraisal of the property at such lower figure would be available to him and the maximum approvable FHA loan would be based on the lower of the two figures.[7]

From this, it is clear that Congress intended to add to the primary purpose of the F.H.A. appraisal system—to protect the government's investment[8]—the secondary purpose of helping to protect the buyer from artificially inflated prices, perhaps beyond the replacement cost, caused by the easy mortgage terms available. Certainly, there is nothing to show that

[7] H. Conf. Rep. 2271, 83d Cong., 2d Sess., pp. 67–68.
[8] *Id.* at 66.

Congress intended to create a duty by which the gov
ernment would compensate a purchaser whenever
due to the government's negligence the property was
not in fact worth the appraised valuation.

CONCLUSION

For the reasons stated in the government's main
brief and for the further reasons stated herein, the
judgment below should be reversed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

No 533.—October Term, 1960.

United States, Petitioner, v. Stanley S. Neustadt, et al. | On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[May 29, 1961.]

Mr. Justice Whittaker delivered the opinion of the Court.

Pursuant to the provisions of the National Housing Act of 1934,[1] as amended, the Federal Housing Administration (FHA) is authorized, in certain instances, to insure the partial repayment of loans secured by mortgages executed to finance the purchase of private residential properties.[2] When duly requested to do so by a qualified lender, the FHA, through its appraisal staff, makes an inspection of property offered for sale in order to determine whether

[1] 48 Stat. 1246, 12 U. S. C. §§ 1701 *et seq.*

[2] Section 203 of the National Housing Act of 1934, as amended, 12 U. S. C. § 1709 (1952 ed., Supp. IV), provided at the times here pertinent that:

"(a) The [Federal Housing] Commissioner is authorized, upon application by the mortgagee, to insure as hereinafter provided any mortgage offered to him which is eligible for insurance as hereinafter provided, and, upon such terms as the Commissioner may prescribe, to make commitments for the insuring of such mortgages prior to the date of their execution or disbursement thereof.

"(b) To be eligible for insurance under this section a mortgage shall—

"(2) Involve a principal obligation . . . not to exceed an amount equal to the sum of (i) 95 per centum . . . of $9,000 of the [FHA]

the property is eligible for FHA mortgage insurance, and to assign an appraised value establishing the maximum amount of mortgage insurance obtainable.[3]

The question for decision in this case is whether the United States may be held liable, under the Federal Tort Claims Act, 28 U. S. C. § 1346 (b),[4] to a purchaser of residential property who has been furnished a statement reporting the results of an inaccurate FHA inspection and appraisal, and who, in reliance thereon, has been induced by the seller to pay a purchase price in excess of the property's fair market value. The answer turns upon the correct interpretation of 28 U. S. C. § 2680 (h), which precludes recovery under the Tort Claims Act upon "[a]ny claim arising out of . . . misrepresentation." The material facts giving rise to the controversy are not in dispute, and may be summarized as follows.

Early in 1957, the property in question, consisting of a 16-year-old single-family brick house and lot located in Alexandria, Virginia, was offered for sale by its owners. To assure that FHA mortgage insurance would be available to secure a loan in the event that the purchaser, when ascertained, might desire to finance the purchase by that method, the owners requested a qualified lending institution to take the necessary steps to have the property inspected and appraised by the FHA; and pursuant

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appraised value (as of the date the mortgage is accepted for insurance), and (ii) 75 per centum of such value in excess of $9,000 . . . ."

[3] 24 CFR §§ 200.145, 200.146, 200.148 (1959 ed.).

[4] "[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

to the lending agent's application,[5] an FHA appraiser visited and inspected the premises. On the basis of that inspection, which disclosed no defects that would disqualify the property for mortgage insurance, the FHA issued to the lending agency a "conditional commitment,"[6] stating that the property had been approved for mortgage insurance and, for that purpose, had been assigned an appraised value of $22,750. Under § 203 (b) (2) of the National Housing Act,[7] the maximum amount of mortgage insurance obtainable on an appraised value of $22,750 was $18,800.[8]

Shortly thereafter, the respondents, Mr. and Mrs. Stanley S. Neustadt, examined the property and became interested in buying it. After negotiations extending over the period of a month, in the course of which respondents were advised by the sellers that the property had been appraised by the FHA at a value of $22,750 for mortgage insurance purposes, respondents entered into a conditional contract to purchase the property at a price of $24,000. The contract was conditioned upon the respondents' obtaining a loan secured by an FHA-

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[5] An application for FHA mortgage insurance may be made only by a financial institution approved as a mortgagee by the FHA. § 203 (a), National Housing Act, *supra*, 12 U. S. C. § 1709 (a). Applications may be, and commonly are, made in advance of actual sale and execution of the mortgage, 24 CFR § 221.9 (1959 ed.), in order that the seller may have the property inspected, approved, and appraised for mortgage insurance while the purchaser is still unknown.

[6] The commitment to insure a mortgage is conditioned upon the mortgagor's being found financially able to carry the mortgage. 24 CFR §§ 200.147, 200.148 (1) (1959 ed.).

[7] Note 2, *supra*.

[8] Under § 203 (b) (2), the maximum insurable amount was $18,862.50 (95% of $9,000, plus 75% of $13,750). By FHA regulations, mortgages were insurable only in multiples of $100. 24 CFR § 221.17 (a) (1958 Supp.).

insured mortgage in the amount of $18,800. In accordance with § 226 of the National Housing Act,[9] the contract also provided that the sellers would deliver to respondents, prior to the sale of the property, a written statement setting forth the FHA-appraised value. Both conditions were fulfilled, and on the settlement date, July 2, 1957, respondents took title to the property, and acknowledged by their signatures that they had been furnished with a written "Statement of FHA Appraisal." This was an official FHA document, stating that the FHA "has appraised the property identified . . . and for mortgage insurance purposes has placed an appraised value of $22,750 on such property as of the date of this statement. (*The FHA appraised value does not establish sales price.*)" (Emphasis in original.)

Respondents moved into the house on July 10, 1957. According to their testimony, they had previously inspected the house "quite carefully," and had found "absolutely nothing which would indicate the necessity for any redecoration at all." The house was "immaculately clean" and the walls and ceilings "looked fine." However, within a month after respondents moved in, substantial cracks developed in the ceilings and in the interior and exterior walls throughout the house. When building repair contractors were unable to ascertain the cause of the cracks, the original builder of the house and four FHA field inspectors were summoned, and a

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[9] Section 226 was enacted in 1954 (68 Stat. 607, 12 U. S. C. § 1715q) and provides in pertinent part as follows:

"The Commissioner is hereby authorized and directed to require that, in connection with any property . . . approved for mortgage insurance . . . the seller or builder . . . shall agree to deliver, prior to the sale of the property, to the person purchasing such dwelling for his own occupancy, a written statement setting forth the amount of the appraised value of the property as determined by the Commissioner. . . ."

thorough investigation was made by them. By drilling a hole through the concrete floor of the basement, it was discovered that the subsoil was composed of a type of clay which becomes pliable when moist. Due to poor drainage conditions on the surface, water had seeped into the clay, causing it to shift beneath the foundations of the house and to produce the cracks which had appeared in the walls and ceilings.

Ten months thereafter, respondents commenced this action against the Government, under the Federal Tort Claims Act, in the United States District Court for the Eastern District of Virginia, seeking recovery of the difference between the fair market value of the property and the purchase price of $24,000. The complaint alleged that the FHA's inspection and appraisal of the property for mortgage insurance purposes had been conducted negligently; that respondents were justified in relying upon the results of that inspection and appraisal; and that they "would not have purchased the property for $24,000 but for the carelessness and negligence of [FHA]."

After trial, the District Court found [10] that respondents "in good faith relied upon the [FHA's] appraisal in consummating their contract of purchase," and that "reasonable care by a qualified appraiser would have warned" respondents of the "serious structural defects" in the house which had been "preponderantly proved." On that basis, the court adjudged the Government liable in the amount of $8,000, which it found to be the difference between the property's fair market value at the time of sale ($16,000) and the purchase price ($24,000).

On appeal, the judgment was affirmed by the Court of Appeals for the Fourth Circuit, 281 F. 2d 596, over the

[10] There is no right to a jury trial under the Tort Claims Act. 28 U. S. C. § 2402.

Government's sedulous objection that recovery was barred by 28 U. S. C. § 2680 (h), which excepts from the coverage of the Tort Claims Act "[a]ny claim arising out of . . . misrepresentation." Because of the importance of the question, and to resolve an apparent conflict between the Fourth Circuit's decision and the holdings of other Circuits uniformly construing the "misrepresentation" exception of § 2680 (h) to preclude recovery on closely analogous facts,[11] we granted certiorari. 364 U. S. 926. We have concluded that the interpretation adopted by the Fourth Circuit is erroneous, and that the Government must be absolved from liability.

In its complete form, § 2680 (h) excludes recovery under the Federal Tort Claims Act upon "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, *misrepresentation, deceit,* or interference with contract rights." (Emphasis added.) The Government's position is that, since Congress employed both the terms "misrepresentation" and "deceit" in § 2680 (h), it clearly meant to exclude claims arising out of negligent, as well as deliberate, misrepresentation; and therefore, even assuming that the District Court correctly found that the inaccurate FHA appraisal in this case resulted from a negligent inspection, and that respondents relied upon that appraisal to their detriment,[12] the claim must nevertheless fail as one "arising out of . . . [negligent] misrepresentation."

We are in accord with the view urged by the Government, and unanimously adopted by all Circuits which have previously had occasion to pass on the question, that § 2680 (h) comprehends claims arising out of negligent, as well as willful, misrepresentation.

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[11] The cases are cited and discussed at pp. 7–9, *infra*.

[12] Neither in the Court of Appeals, nor in this Court, has the Government chosen to contest these findings.

The leading precedent has been the Second Circuit's decision in *Jones* v. *United States*, 207 F. 2d 563, which involved a statement issued to the plaintiffs by the United States Geological Survey erroneously estimating the oil-producing capacity of certain land. In reliance upon that statement, plaintiffs sold securities representing oil and gas rights in the land for less than their actual value, and later sought to recoup their loss from the Government under the Tort Claims Act on a complaint alleging negligent misrepresentation. Affirming a dismissal of the complaint, the Second Circuit tersely pointed out that § 2680 (h) applies to both "misrepresentation" and "deceit," and, "[a]s 'decit' means fraudulent misrepresentation, 'misrepresentation' must have been meant to include negligent misrepresentation, since otherwise the word 'misrepresentation' would be duplicative." 207 F. 2d, at 564. Following this interpretation, in an unbroken line, are the cases of *National Mfg. Co.* v. *United States*, 210 F. 2d 263 (C. A. 8th Cir.); *Clark* v. *United States*, 218 F. 2d 446 (C. A. 9th Cir.); *Miller Harness Co.* v. *United States*, 241 F. 2d 781 (C. A. 2d Cir.); *Anglo-American Corp.* v. *United States*, 242 F. 2d 236 (C. A. 2d Cir.); *Hall* v. *United States*, 274 F. 2d 69 (C. A. 10th Cir.). In accord also are *Social Security Adm'n* v. *United States*, 138 F. Supp. 639 (D. C. D. Md.), and *United States* v. *Van Meter*, 149 F. Supp. 493 (D. C. N. D. Cal.).

Throughout this line of decisions, the argument has been made by plaintiffs, and consistently rejected by the courts, until this case, that the bar of § 2680 (h) does not apply when the gist of the claim lies in *negligence* underlying the inaccurate representation, *i. e.*, when the claim is phrased as one "arising out of" negligence rather than "misrepresentation." But this argument, as was forcefully demonstrated by the Tenth Circuit in *Hall* v. *United States*, *supra*, is nothing more than an attempt to circumvent § 2680 (h) by denying that it applies to

negligent misrepresentation. In the *Hall* case, it was alleged that agents of the Department of Agriculture had negligently inspected the plaintiff's cattle and, as a result, mistakenly reported that the cattle were diseased. Relying upon that report, plaintiff sold the cattle at less than their fair value, and sought recovery from the Government of his loss on the ground that it had been caused by the negligent inspection underlying the agents' report, rather than by the report itself. The Tenth Circuit rejected the claim, stating:

> "We must then look beyond the literal meaning of the language to ascertain the real cause of complaint. . . . Plaintiff's loss came about when the Government agents misrepresented the condition of the cattle, telling him they were diseased when, in fact, they were free from disease. . . . This stated a cause of action predicated on a misrepresentation. Misrepresentation as used in the exclusionary provision [of § 2680 (h)] was meant to include negligent misrepresentation." 274 F. 2d, at 71.[13]

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[13] In *Anglo-American & Overseas Corp.* v. *United States*, 242 F. 2d 237, the Second Circuit analyzed a similar claim and exposed its true basis: "[Plaintiff] contracted to sell tomato paste to the United States, which required as a condition precedent to its acceptance of the paste that it satisfy the standards of the Food and Drug Administration. The paste was imported; and the Food and Drug Administration, after sampling it, issued 'release notices' that notified Customs officers that the tomato paste could enter the country. [Plaintiff] then accepted delivery. When it in turn delivered the paste to the government, federal officials once again inspected the paste, found that it did not satisfy the standards of the Food and Drug Administration, and ordered it destroyed. [Plaintiff] sues now on the ground that the negligence of officials of the Food and Drug Administration in sampling the tomato paste and in issuing the 'release notices' induced it to accept the paste and thus suffer damages.

"This claim, it is clear, 'arose out of' the assertedly negligent repre-

In the instant case, the Fourth Circuit took the opposite view, and held that respondents could recover on the sole basis of the underlying negligence. Although it agreed that § 2680 (h) embraces both "negligent" and "willful" misrepresentation, and that respondents' claim "might form the basis of an action for misrepresentation under general common-law principles," 281 F. 2d, at 601, it deemed § 2680 (h) inapplicable here for the reason that the misrepresentation was "merely incidental" to the "gravamen" of the claim, *i. e.*, "the careless making of an excessive appraisal so that [respondents were] . . . deceived and suffered substantial loss." *Id.*, at 602. Since § 226 of the National Housing Act [14] requires that a seller of property approved for FHA mortgage insurance "shall agree to deliver, prior to the sale of the property, to the person purchasing such [property], a written statement setting forth the amount of the [FHA] appraised value . . . ," the Fourth Circuit reasoned that the FHA appraisal procedure was designed to protect prospective home purchasers; that the Government (through the FHA) therefore "owed a specific duty" to respondents to make a careful appraisal; and that "if the Government assumes a duty and negligently performs it, a party injured thereby may recover damages even though the careless performance of the duty may have been accompanied by some misrepresentation of fact." *Id.*, at 600.

Whether or not this analysis accords with the law of States which have seen fit to allow recovery under anal-

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sentation of the quality of the tomato paste by federal employees. Such a claim is barred by . . . Section 2680 (h) . . . [which excepts] from liability negligent as well as intentional misrepresentation." *Id.*, at 236–237.

[14] Note 8, *supra*.

ogous circumstances,[15] it does not meet the question of whether this claim is outside the intended scope of the Federal Tort Claims Act, which depends solely upon what Congress meant by the language it used in § 2680 (h).

To say, as the Fourth Circuit did, that a claim arises out of "negligence," rather than "misrepresentation," when the loss suffered by the injured party is caused by

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[15] The Fourth Circuit sought primary support from the New York Court of Appeals' decision in *Glanzer* v. *Sheppard*, 233 N. Y. 236, 135 N. E. 275, in which the defendants, who were public weighers, were requested by a vendor to weigh certain goods and to issue a certificate of weight to the buyer. The goods were weighed inaccurately, and on the strength of the erroneous weight certificate, the buyer paid an excessive purchase price. In allowing the buyer to recover from defendants, the New York court looked primarily to the negligence in performing the act of weighing, and stated that defendants were liable both for their "careless words" and their "careless performance of a service." The case has been widely discussed by tort authorities as epitomizing "negligent misrepresentation." See, *e. g.*, 1 Harper and James, Torts 546–548 (1956); Prosser, Torts 734, 737 (1941 ed.); Bohlen, Should Negligent Misrepresentations Be Treated as Negligence or Fraud?, 18 Va. L. Rev. 703, 708 (1932). *Glanzer* has been followed in a number of States which have broken from the earlier, virtually unanimous, American view subscribing to the English case of *Derry* v. *Peek*, L. R. 14 App. Cas. 337, 58 L. J. Rep. Ch. 864 (1889) (refusing to allow recovery for negligent misrepresentation). See cases cited in 1 Harper and James, Torts 546, n. 5 (1956). Cf. *Ultramares Corp.* v. *Touche*, 255 N. Y. 170, 174 N. E. 441.

Under the Federal Tort Claims Act, when a claim is not barred by one of the Act's exclusionary provisions, the liability of the Government must be determined "in accordance with the law of the place where the act or omission occurred." 28 U. S. C. § 1346 (b). The Fourth Circuit's opinion, although it concluded that § 2680 (h) did not bar respondents' claim, did not indicate whether Virginia law follows the New York rule of *Glanzer* v. *Sheppard*, *supra*. In view of our conclusion that § 2680 (h) applies, we need not explore this question.

the breach of a "specific duty" owed by the Government to him, *i. e.*, the duty to use due care in obtaining and communicating information upon which that party may reasonably be expected to rely in the conduct of his economic affairs, is only to state the traditional and commonly understood legal definition of the tort of "negligent misrepresentation," as is clearly, if not conclusively, shown by the authorities set forth in the margin,[16] and

[16] The American Law Institute's Restatement of Torts (1938), c. 22, "DECEIT: BUSINESS TRANSACTIONS," Topic 3, "Negligent Misrepresentations," states as follows:

"§ 552. Information Negligently Supplied for the Guidance of Others.

"One who in the course of his business or profession supplies information for the guidance of others in their business transactions is subject to liability for harm caused to them by their reliance upon the information if

"(a) he fails to exercise that care and competence in obtaining and communicating the information which its recipient is justified in expecting, and

"(b) the harm is suffered

"(i) by the person or one of the class of persons for whose guidance the information was supplied, and

"(ii) because of his justifiable reliance upon it in a transaction in which it was intended to influence his conduct or in a transaction substantially identical therewith."

Prosser, Torts (1941 ed.), c. 16, "Misrepresentation," § 87, "Basis of Responsibility," states:

"Responsibility for misrepresentation may be divided into the usual tort classifications. It may rest upon:

"a. An intent to deceive, consisting of belief that the representation is false. . . . [S]uch an intent is required for the action of deceit.

"b. Negligence in obtaining information or making the representation. . . .

"c. A policy holding the maker strictly responsible for the truth of the representation . . . ."

See also Bohlen, Misrepresentation as Deceit, Negligence, or Warranty, 42 Harv. L. Rev. 733, 735–739 (1929); 23 Am. Jur., Fraud and Deceit, § 126, "Negligent Representations" (1939).

which there is every reason to believe Congress had in mind when it placed the word "misrepresentation" before the word "deceit" in § 2680 (h). As the Second Circuit observed in *Jones* v. *United States, supra*, "deceit" alone would have been sufficient had Congress intended only to except deliberately false representations.[17] Certainly there is no warrant for assuming that Congress was unaware of established tort definitions when it enacted the Tort Claims Act in 1946, after spending "some twenty-eight years of congressional drafting and redrafting, amendment and counter-amendment." *United States* v. *Spelar*, 338 U. S. 217, 219–220. Moreover, as we have said in considering other aspects of the Act: "There is nothing in the Tort Claims Act which shows that Congress intended to draw distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation." *Indian Towing Co.* v. *United States*, 350 U. S. 61, 68.

Regarding the Court of Appeals' assertion that the Government owed respondents a "specific duty" to make and communicate an accurate appraisal of the property, by virtue of the provisions of the National Housing Act, we have carefully examined the rather extensive legislative history of that statute, giving particular attention to § 226 thereof,[18] and have found nothing from which we may reasonably infer that Congress intended, in a case

[17] See 2 Harper and James, Torts § 29.13, The Federal Tort Claims Act: Exceptions to Liability, p. 1655 (1956).

[18] 78 Cong. Rec. 11980 *et seq.*; 1st Annual Report of FHA (1935) (*passim*); 100 Cong. Rec. 12349–12360; S. Rep. No. 1472, 83d Cong., 2d Sess.; S. Rep. No. 2271, 83d Cong., 2d Sess.; H. R. Rep. No. 1429, 83d Cong., 2d Sess.; H. R. Rep. No. 2271, 83d Cong., 2d Sess.; Hearings Before the Senate Committee on Banking and Currency on the Housing Act of 1954, 83d Cong., 2d Sess.; Hearings before the House Committee on Banking and Currency on Housing Act of 1954, 83d Cong., 2d Sess.

such as this, to limit or suspend the application of the "misrepresentation" exception of the Tort Claims Act. Long before § 226 was added to the National Housing Act, in 1954, requiring sellers to inform prospective buyers of FHA-appraised value, it had been recognized in Congress that FHA appraisals would be a matter of public record, and would thus inure, incidentally, to the benefit of prospective home purchasers, by affording them the "protection of knowing the appraised value set upon the property . . . by a trained valuator acting in accordance with a procedure designed to reduce to a minimum errors that might result from casual or hasty conclusions." [19] But at the same time, it was repeatedly emphasized that the primary and predominant objective of the appraisal system was the "protection of the Government and its insurance funds"; [20] that the mortgage insurance program was not designed to insure anything other than the repayment of loans made by lender-mortgagees; [21] and that "there is no legal relationship between the FHA and the individual mortgagor." [22] Never once was it even intimated that, by an FHA appraisal, the Government would, in any sense, represent or guarantee to the purchaser that he was receiving a certain value for his money.

Nor is there any indication that Congress intended, by its 1954 addition of § 226, to modify the legislation's fundamental design from a system of mortgage repayment insurance to one of guaranty or warranty to the purchaser of value received. On its face, § 226 goes no

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[19] First Annual Report of FHA 17 (1935). See also 90 Cong. Rec. A2985; 78 Cong. Rec. 11981.

[20] H. R. Rep. No. 2271, 83d Cong., 2d Sess., p. 66.

[21] 78 Cong. Rec. 11981; 1st Annual Report of FHA, 15 (1935).

[22] H. R. Rep No. 2271, 83d Cong., 2d Sess., pp. 66–67.

further than to require that a seller of property approved for FHA mortgage insurance shall furnish to the buyer, prior to sale, a written statement disclosing the FHA-appraised value.[23] That Congress did not thereby intend to convert the FHA appraisal into a warranty of value, or otherwise to extend to the purchaser any actionable right of redress against the Government in the event of a faulty appraisal, was made irrefutably clear in the Committee Hearings in both Houses of Congress, the pertinent excerpts from which are set forth in the margin.[24] Moreover, at the time § 226 was adopted, it is not unreasonable to suppose that Congress was aware of the "misrepresentation" exception in the Tort Claims Act, and

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[23] Note 9, *supra*.

[24] It was stated by Representative Dollinger, in the Hearings before the Subcommittee on Housing of the House Committee on Banking and Currency on "Housing Constructed Under VA and FHA Programs," 82d Cong., 2d Sess., at 163:

"The Government did not guarantee, on your getting the home, that the home would be in good condition. As I pointed out before, there has been a misconception of the idea. The Government never approved the building. All it says is that the FHA loans are guaranteed to the builder or to the bank."

In the Hearings before the Senate Committee on Banking and Currency on Housing Act of 1954, 83d Cong., 2d Sess., at 1402–1403, the following colloquy was recorded between Senator Bennett and Home Finance Administrator Cole:

"Mr. COLE: . . . I agree with the Senator that the home buyer should understand that the Federal Government is not guaranteeing his home.

"Senator BENNETT: That is correct. . . . The idea of the inspection service under title II is to protect the Federal Government, which undertakes to insure the loan. The fact that the inspection is made, provides collateral benefits to the property owner. There is no question about that. But in the last analysis the property owner cannot say to the Federal Government, 'Well, your inspector inspected my house, and now look what's happened; therefore, you are responsible; therefore, you must come down here and fix it up.'"

that it had been construed by the courts to include "negligent misrepresentation."[25]

The compulsory disclosure provision of § 226 is but one of numerous instances in which Congress has relegated to a governmental agency the duty either to disclose directly, or to require private persons to disclose, information for the assistance and guidance of other persons in the conduct of their economic and commercial affairs. In practically all such instances, it may be said that the Government owes a "specific duty" to obtain and communicate information carefully, lest the intended recipient be misled to his financial harm. While we do not condone carelessness by government employees in gathering and promulgating such information, neither can we justifiably ignore the plain words Congress has used in limiting the scope of the Government's tort liability.[26]

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[25] *Jones* v. *United States*, *supra*, and *National Mfg. Co.* v. *United States*, *supra*, had both been decided, by the Second and Eighth Circuits, respectively, when Congress enacted § 226 in 1954.

[26] Our conclusion neither conflicts with nor impairs the authority of *Indian Towing Co.* v. *United States*, 350 U. S. 61, which held cognizable a Torts Act claim for property damages suffered when a vessel ran aground as a result of the Coast Guard's allegedly negligent failure to maintain the beacon lamp in a lighthouse. Such a claim does not "arise out of . . . misrepresentation," any more than does one based upon a motor vehicle operator's negligence in giving a misleading turn signal. As Dean Prosser has observed, many familiar forms of negligent conduct may be said to involve an element of "misrepresentation," in the generic sense of that word, but "[s]o far as misrepresentation has been treated as giving rise in and of itself to a distinct cause of action in tort, it has been identified with the common law action of deceit," and has been confined "very largely to the invasion of interests of a financial or commercial character, in the course of business dealings." Prosser, Torts, § 85, "Remedies for Misrepresentation," at 702–703 (1941 ed.). See also 2 Harper and James, Torts, § 29.13, at 1655 (1956).

It follows that respondents' claim is one "arising out of . . . misrepresentation," within the meaning of § 2680 (h), and hence is not actionable against the Government under the Tort Claims Act. Accordingly, the judgment below must be

Reversed.

MR. JUSTICE DOUGLAS dissents.

MR. JUSTICE STEWART took no part in the consideration or decision of this case.